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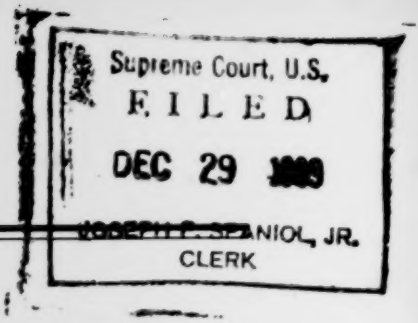

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

STATE OF NEW JERSEY

v.

LEROY HOWARD

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

RICHARD E. HICKEY, III
GLOUCESTER COUNTY
PROSECUTOR
County Annex Bldg.
P.O. Box 623
Woodbury, New Jersey 08096
(609) 853-3701

JOHN A. MENNITE, Assistant Prosecutor
Of Counsel and on the Petition

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QUESTIONS PRESENTED

1. In a rape/murder case where the victim's child named and identified the defendant at the scene, and this identification was corroborated by bloodstain evidence, should double jeopardy principles bar a retrial where a mistrial was declared and the jury discharged without defense objection during the defendant's opening statement, and where mistrial was declared in response to the defense attorney's own actions and through no fault of the prosecution?

2. Did the New Jersey Supreme Court and the Appellate Division of the New Jersey Superior Court purposely ignore and refuse to follow the decisions of the United States Supreme Court in *Arizona* v. *Washington*, 434 *U.S.* 497 (1978); *Gori* v. *United States*, 367 *U.S.* 364 (1961), *reh. den.* 368 *U.S.* (1961); and *United States* v. *Dinitz*, 424 *U.S.* 600 (1976) on remand, 538 *F.2d* 1214 (5th Cir. 1976), *reh. den.* 542 *F.2d.* 1174 (5th Cir. 1976), *cert. den.* 429 *U.S.* 1104 (1977), all of which permitted retrial after mistrial had been declared in circumstances similar to those in the instant case?

3. Did the New Jersey Courts decide the instant matter contrary to the decision of the District of Columbia Circuit Court of Appeals in *United States* v. *Sedgwick*, 345 *A.2d* 465 (D.C. App. 1975), *cert. den.*, 425 *U.S.* 966 (1976), and contrary to the decision of the U.S. Court of Appeals for the 5th Circuit in *U.S.* v. *Pridgeon*, 462 *F.2d* 1094 (5th Cir. 1972)?

4. Does the public's interest in having a rape/murder case presented to and decided by a jury outweigh the burden created by causing the defendant to sit for a second time through the jury selection process, the prosecutor's opening statement, and the first part of the defense attorney's opening statement?

PARTIES TO THE PROCEEDING

The parties to the proceeding in the Supreme Court of the State of New Jersey whose judgment is sought to be reviewed are:

1. The State of New Jersey, represented by the Gloucester County Prosecutor's Office.

2. Leroy Howard.

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APPENDICES

A. Order of the Supreme Court of the State of New Jersey, dated October 31, 1989, filed November 1, 1989 . . . . . 1a

B. Opinion of the Superior Court of New Jersey, Appellate Division, dated August 7, 1989, reported at 235 *N.J. Super.* 243, 561 *A.*2d 1202 (App. Div. 1989) 1b

C. Excerpt from transcript of trial conducted before the Honorable Ernest L. Alvino, J.S.C., dated November 4, 1988 . . . . . 1c

D. Excerpt from transcript of trial conducted before the Honorable Ernest L. Alvino, J.S.C., dated November 7, 1988 . . . . . 1d

OPINIONS BELOW

The following are reproduced in their entirety in the Appendix:

Order of the New Jersey Supreme Court denying Certification, dated October 31, 1989, filed November 1, 1989.

Opinion of the Superior Court of New Jersey Appellate Division, dated August 7, 1989, reported at 235 *N.J. Super.* 243, 561 *A.*2d 1202 (App. Div. 1989).

JURISDICTION

The Order of the Supreme Court of the State of New Jersey denying Certification, of which Order review is herein sought was issued on October 31, 1989 and was filed on November 1, 1989. No application for an extension of time to file this Petition for Certiorari has been made. This Court's jurisdiction is invoked under 28 U.S.C.A. Section 1257.

CONSTITUTIONAL PROVISIONS & STATUTES INVOLVED

United States Constitution Amendment V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution Amendment XIV, Section 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This is a murder case in which the victim, Wilma Jean Wilson, was first raped (although the rape itself was not charged) and then murdered in the presence of her two-year-old daughter and her five-year-old son, Samuel Wilson. Samuel named and identified the defendant at the scene. Blood matching that of the menstruating victim, and not matching the defendant's, was found on defendant's undershorts.

The case has had a protracted procedural history. The points requiring this Court's immediate attention are set forth below.

The defendant was sixteen years old on the incident date, December 30, 1975. A juvenile waiver hearing was held on January 13th and 22nd, 1976, at which testimony was taken to determine the competency of Samuel. At this hearing, Samuel identified the defendant. On December 2, 1976, the court found that Samuel had the mental capacity to testify about the incident, but ruled him incompetent because he did not understand the significance of his oath to tell the truth. The court also waived the defendant to adult court.

The defendant appealed the waiver decision. In the meantime, the State presented the matter to the Grand Jury without any reference to the testimony of Samuel, because he had been ruled incompetent. The Grand Jury refused to

indict. The defendant withdrew the waiver appeal without prejudice in 1977.

The case was reviewed infrequently between 1977 and 1983, when Detective Wechter of the Gloucester County Prosecutor's Office interviewed Samuel, then twelve, and found him to remember the incident. A juvenile complaint was signed. The waiver appeal was re-instated and ultimately withdrawn. On October 16, 1984, after hearing testimony from several witnesses including Samuel Wilson, then fourteen, the Grand Jury indicted the defendant for non-capital murder.

Various motions were brought over the years, which had the effect of delaying trial. Trial was commenced when sixteen jurors were chosen, but not sworn, on October 24, 1988, and were directed to return on November 4, 1988. On November 4th, three jurors were excused and a new jury panel was brought into the courtroom to fill these vacancies.

During jury selection on November 4, the trial judge informed the panel that the incident giving rise to this case had happened thirteen years ago, and assured them that they would receive an explanation for the delay and would be satisfied with that explanation. The judge informed the jurors, once they had been sworn, that they would be judges of the facts, and if they should have any question regarding the testimony of a witness, and should communicate that question to the court, the court would merely send them a note indicating that they had to rely on their own recollection.

The jury then heard the State's opening statement. The prosecutor did not mention the fact that Samuel Wilson had identified Leroy Howard during the course of the juvenile waiver hearing held in 1976, and made no mention whatsoever of that hearing. During his opening statement, the defense attorney told the jury that the defendant had been a juvenile and had been charged as a juvenile at the time of the

offense ("back then"). Counsel then told the jury, " . . . after this occurred, and after Leroy was charged as a juvenile *the first time around*, there was a hearing. There was a juvenile court hearing, and I represented him back then." (Emphasis supplied.)

The State requested a side bar conference at that point. At side bar, defense counsel indicated that he intended to inform the jury that Judge Klaisz, who was sitting in Juvenile Court in 1976, had made a finding that Samuel Wilson was incompetent to testify. The State objected, on the basis that the evidence of the prior finding of incompetence was inadmissible. The trial judge indicated that he would admit that evidence, at which point the State moved for a mistrial on the basis of that ruling. The trial judge denied the motion for mistrial (App. C-2).

The record does not indicate any defense objection, although it does not necessarily indicate that the defense had an opportunity to object before the judge denied the motion.

In response to an inquiry by the judge, the State objected to having the defendant continue his opening statement, and asked for an opportunity during the lunch hour, which had already arrived, to determine whether it would seek leave to take an interlocutory appeal (App. C-2).

Upon returning after lunch, the State once again made a motion for mistrial, this time on the grounds that:

> (1) The judge's assurances regarding a satisfactory explanation for the thirteen year delay put an undue burden on the State to explain the delay, which in itself is irrelevant;
>
> (2) The Court's remarks regarding clarification of testimony discouraged the jury from seeking clarification; and
>
> (3) Defense counsel had made improper remarks about prior juvenile proceedings, and the Court had ruled that a prior finding of incompetency regarding

Samuel Wilson could be admitted into evidence. (App. C-3 to 5.)

After the recitation of the State's grounds for its mistrial motion, the following exchange took place:

> THE COURT: All right. Thank you. Mr. Faulk, any response?
>
> MR. FAULK: Nothing, Your Honor, no. (App. C-5.)

The court then granted the State's motion for a mistrial (App. C-6). The defendant had not posed any objection to the motion at that point. After the Court's granting of the mistrial motion, the defendant moved to dismiss the indictment on the basis of double jeopardy (App. C-6). The Court denied this motion. Even when making his motion to dismiss the indictment on grounds of double jeopardy, the defendant did not object to the granting of the mistrial motion, and did not object to the discharge of the jury. Although the jury had not yet been brought into the courtroom, counsel stated that the Court had already dismissed the jury (App. C-6). Following the Court's ruling, defense counsel's last comment before the jury was brought back into the courtroom to be discharged was the following:

> MR. FAULK: I assume we are going to bring the jury back and tell them and give them the good news? (App. C-9.)

The trial judge at first ruled that evidence of the incompetency finding was admissible (App. C-1 to 2). However, he later found that the incompetency evidence was inadmissible, and that his prior order admitting it had served as a misdirection to the prosecutor, which had precipitated the State's mistrial motion (App. D-5 to 6).

The defendant moved for leave to appeal the court's ruling denying his motion for dismissal on the grounds of double jeopardy, as well as the court's ruling that the proffered evidence was inadmissible. The Appellate Division of

the New Jersey Superior Court granted leave to appeal and granted the defendant's application to reverse the trial judge's ruling denying dismissal on grounds of double jeopardy. The Appellate Division refused to reach the issue of whether the incompetency evidence was admissible. The Appellate Division also refused even to acknowledge the cases of *Arizona* v. *Washington*, *Gori* v. *U.S.*, and *U.S.* v. *Dinitz*, all of which were United States Supreme Court cases supporting the State's position and cited by the State in its brief.

The State filed in the Supreme Court of New Jersey a timely Notice of Petition for Certification on August 24, 1989. The New Jersey Supreme Court issued an Order denying Certification without a written opinion on October 31, 1989, which Order was filed on November 1, 1989. (App. A.)

REASONS FOR GRANTING THE WRIT

1. THE NEW JERSEY SUPREME COURT AND THE APPELLATE DIVISION OF THE NEW JERSEY SUPERIOR COURT PURPOSELY IGNORED AND REFUSED TO FOLLOW THE DECISIONS OF THE UNITED STATES SUPREME COURT IN *ARIZONA* V. *WASHINGTON, GORI* V. *UNITED STATES*, AND *UNITED STATES* V. *DINITZ*. THE NEW JERSEY COURTS ALSO DECIDED THIS MATTER IN A WAY CONTRARY TO THE DECISIONS OF THE UNITED STATES COURTS OF APPEALS IN *U.S.* V. *SEDGWICK* AND *U.S.* V. *PRIDGEON*.

The State cited in its petition for certification to the New Jersey Supreme Court and in its brief to the Appellate Division of the New Jersey Superior Court the applicable cases of *Arizona* v. *Washington*, 434 *U.S.* 497 (1978); *U.S.* v. *Dinitz*, 424 *U.S.* 600 (1976), on remand 538 *F.*2d 1214 (5th Cir. 1976), *reh. den.* 542 *F.*2d 1174 (5th Cir. 1976), *cert. den.* 429 *U.S.* 1104 (1977); and *Gori* v. *U.S.*, 367 *U.S.* 364 (1961), *reh.*

den. 368 *U.S.* 70 (1961). The New Jersey Supreme Court did not issue an opinion, but denied certification without an opinion. The Appellate Division of the New Jersey Superior Court did not acknowledge or even cite *Arizona* v. *Washington, U.S.* v. *Dinitz,* or *Gori* v. *U.S.* in its opinion, in which it ruled that re-trial was barred.

Moreover, the Appellate Division refused to decide whether the defendant had in fact attempted to introduce improper evidence before the jury during his opening statement in this murder prosecution. By refusing to decide this issue, the Appellate Division effectively avoided having to confront the decisions in *Arizona* v. *Washington, supra,* and *U.S.* v. *Dinitz, supra,* in which the role of defense counsel in bringing about the mistrial situation was considered critical in the United States Supreme Court's decisions to allow re-trial in both cases.

An indication of the lengths to which the Appellate Division went in order to avoid having to deal with these cases can be seen by the fact that the Appellate Division did not even cite or acknowledge the New Jersey Appellate Division case of *State* v. *Blanks,* 190 *N.J. Super.* 269, 463 *A.*2d 359 (App. Div. 1983), an opinion which had been written by one of the members of the panel which decided the instant case. This is especially noteworthy, since *Blanks* had permitted re-trial in a case in which the mistrial had been provoked by defense misconduct. Furthermore, the *Blanks* opinion relied upon *Arizona* v. *Washington* and *Gori* v. *U.S.* Neither *Blanks, Arizona* v. *Washington, U.S.* v. *Dinitz* nor *Gori* v. *U.S.* was cited in the Appellate Division's opinion in the instant case.

In evaluating this petition, there are several other factors of which the court should take notice, which factors will be set out in more detail below. In particular, it should be noted that the defendant did not object to the State's mistrial motion or to the discharge of the jury. Furthermore, the court specifically found that there was a manifest necessity to declare the mistrial. The defendant did not allege any specific prejudice

which would result from the granting of the mistrial motion. Finally, the court carefully considered the alternative of giving curative instructions, and decided that curative instructions would be inadequate.

In *Arizona* v. *Washington, supra*, the defense attorney at the second trial in that murder prosecution informed the jury in his opening statement (quite accurately) that the defendant had previously been convicted of the offense in question, and that his conviction had been reversed because the State had withheld exculpatory evidence. The trial court found that such a reference to a prior legal proceeding was irrelevant, improper, and unfairly prejudicial to the State, and granted the State's motion for mistrial over the defendant's objection. The United States Supreme Court, in reversing the U.S. Court of Appeals for the 9th Circuit on *certiorari,* held that the record reflected the high degree of necessity for a mistrial ruling so as to avoid a valid plea of double jeopardy. The United States Supreme Court found that although the extent of the possible juror bias cannot be measured and some trial judges might have proceeded after giving appropriate curative instructions, the overriding interest in the even-handed administration of justice requires that the highest degree of respect be accorded to the trial judge's decision to declare a mistrial based on his assessment of the prejudicial impact of defense counsel's opening statement. 434 *U.S.* at 512-514.

In *U.S.* v. *Dinitz, supra*, retrial was not barred where remaining defense counsel moved for a mistrial following the court's exclusion of lead defense counsel for improper remarks in his opening statement. Although the defendant made the mistrial motion in that case, it is analogous to this case in that a defense attorney's actions evoked a response from the court which put the remaining defense attorney in a position which motivated him to request a mistrial. Thus, the situation was created by the behavior of the lead defense attorney, and re-trial was not barred.

In *Gori* v. *U.S., supra,* the trial judge on his own motion declared a mistrial during the direct examination of the government's fourth witness, because he perceived that the prosecuting attorney's line of questioning was calculated to inform the jury of other crimes committed by the accused, even though this information was never brought before the jury. In *Gori,* defense counsel neither approved of nor objected to the judge's action. The New Jersey Appellate Division did not cite, acknowledge, or distinguish the *Gori* decision or its own decision in the case of *State* v. *Blanks,* in which the Appellate Division had quoted the following language from *Gori,* at 190 *N.J. Super.* 276, 463 *A.*2d 363:

> Where, for reasons deemed compelling by the trial judge, who is best situated intelligently to make such a decision, the ends of substantial justice cannot be attained without discontinuing the trial, a mistrial may be declared without the defendant's consent and even over his objection, and he may be re-tried consistently with the Fifth Amendment . . . . It is also clear that "This Court has long favored the rule of discretion in the trial judge to declare a mistrial and to require another panel to try the defendant if the ends of justice will be better served . . . ," and that we have consistently declined to scrutinize with sharp surveillance the exercise of that discretion. [*Id.* at 368, 81 *S.Ct.* at 1526) (citations omitted).]

It should be noted in *Gori* that the offending evidence was never actually put before the jury, but the trial judge perceived that the questioning was tending into an improper area, which he never permitted it to reach. Under these circumstances, the United States Supreme Court upheld the trial judge's exercise of his discretion to abort the trial at that juncture.

The decisions of the New Jersey Courts also were contrary to the decision of the United States Court of Appeals for the 5th Circuit in *U.S.* v. *Pridgeon,* 462 *F.*2d 1094 (5th Cir.

1972), and the decision of the District of Columbia Court of Appeals in *U.S.* v. *Sedgwick*, 345 *A.*2d 465; (D.C. App. 1975), *cert. den.* 425 *U.S.* 966 (1976). In *U.S.* v. *Pridgeon*, the Court of Appeals held that the defendant's retrial was not barred when a mistrial had been declared during the first trial after one-half day of testimony, as a result of indiscretions committed by the defendant's witness and relatives by talking with a juror. In *U.S.* v. *Sedgwick*, which was cited in the brief submitted to the New Jersey Supreme Court, certain previously undisclosed government evidence was revealed shortly before the government completed its case. The trial court, erroneously ruling that this was material evidence and should have been disclosed, declared a mistrial over defendant's objection to allow further investigation. The District of Columbia Court of Appeals held that re-trial was not barred, despite the fact that the mistrial had been based on an erroneous ruling. The United States Supreme Court denied *certiorari*.

In the instant case, the court granted the State's mistrial motion on the basis of the prejudice caused to the State's case by the cumulative effect of the following factors:

> (1) The judge's assurances regarding a satisfactory explanation for the thirteen year delay put an undue burden on the State to explain the delay which in itself is irrelevant;
>
> (2) The Court's remarks regarding clarification of testimony discouraged the jury from seeking clarification; and
>
> (3) Defense counsel had made improper remarks about prior juvenile proceedings, and the Court had ruled that a prior finding of incompetency regarding Samuel Wilson could be admitted into evidence. (Appendix C-3 to 6.)

The cumulative effect of the court's remark regarding a prospective explanation for the delay and the non-availability

of read-backs of testimony, together with the defense attorney's remarks regarding prior juvenile proceedings and the court's ruling admitting the prior finding of incompetency of Samuel Wilson, made the declaration of a mistrial a manifest necessity. At that point, it became impossible for the State to get a fair trial in this matter. The court found specifically that there was a manifest necessity to declare a mistrial. (App. D-5.)

In particular, this Court should note that the State did nothing to provoke the mistrial, and the mistrial was provoked in large part by the actions of the defense attorney in attempting to introduce improper evidence. In this respect, this case bears a factual similarity to the cases of *Arizona* v. *Washington*, *supra*, and *U.S.* v. *Dinitz*, *supra*.

By telling the jury they would be satisfied with the explanation for the delay, the trial court put the State in the position of having to present an explanation. Although the delay itself may be relevant to claims that an alibi witness has died in the interim, or that the State's witnesses cannot remember accurately, the reasons for the delay are irrelevant to a factual determination. *Arizona* v. *Washington*, 434 *U.S.* at 510-511, 521; *State* v. *Blanks*, 190 *N.J. Super.* at 278, 463 *A.*2d at 364.

The only thing relevant about the procedural history would be the results of any determinations regarding facts which may or may not be presented to the jury. It would not be proper, for example, to tell the jury that the defendant initially opposed the State's efforts to have him tried as an adult, appealed that decision to the Appellate Division, and after having succeeded on his appeal, withdrew his opposition to being tried as an adult, all of which resulted in delay. Nor would it be proper to tell the jury that the defendant successfully excluded certain bloodstain evidence at the trial level in 1985, necessitating an appeal on which the State prevailed, which resulted in another year's delay. It would not be proper either to permit the defendant to present a review of the procedural history for the purpose of persuading the

jury that the State had persecuted the defendant by persisting in its efforts to prosecute him despite his considerable efforts to avoid prosecution. *Arizona* v. *Washington*, 434 *U.S.* at 499-500, fn.3, 510-511; *State* v. *Blanks*, 190 *N.J. Super.* at 278, 463 *A.*2d at 364. The only relevant matters to be presented to the jury are the facts.

Even if the reasons for delay were relevant, they should have been excluded under *New Jersey Evidence Rule 4*, since the presentation of such issues to the jury would entail undue consumption of time, create undue prejudice, confuse the issues, and mislead the jury, who would not be qualified or entitled to pass judgment on the propriety of the legal decisions of prior tribunals regarding this case. Moreover, since the State deemed these matters irrelevant, the State was not prepared to present witnesses on this topic (App. C-3 to 4). In fact, had the State attempted to present a review of the entire procedural history, such a review would have been excluded because it was a legal matter irrelevant to a factual determination. Furthermore, the defendant had already presented the court with a review of the procedural history in the context of a motion for dismissal on due process grounds, which motion was denied, and the denial was not appealed.

Although the court attempted to give the jury curative instructions regarding the delay, it is respectfully submitted that those instructions did not eliminate the prejudice, and were not in themselves very clear (App. B-5).

Regarding the second ground advanced for mistrial, the Court's remarks conditioned the jury not to ask for clarifications as to testimony. This is clearly in conflict with the case law which gives the court the discretion to read back to the jury portions of testimony if they so request. *State* v. *Wilkerson*, 60 *N.J.* 452, 291 *A.*2d 8 (1972); *State* v. *Wolf*, 44 *N.J.* 176, 207 *A.*2d 670 (1965); *State* v. *Lamb*, 134 *N.J. Super.* 575, 342 *A.*2d 533 (App. Div. 1975), *aff'd* 71 *N.J.* 545, 366 *A.*2d 981 (1976); *State* v. *Garrigan*, 126 *N.J. Super.* 442, 315 *A.*2d 415 (App. Div. 1973), *aff'd* 64 *N.J.* 287, 315 *A.*2d 385 (1974).

Thus, this statement to the jury compromised the integrity of the trial as a search for the truth.

The third basis advanced in support of the State's mistrial motion and cited by the court in granting the mistrial motion, was that the defendant had improperly referred to prior proceedings in juvenile court during his opening statement, and had sought to introduce irrelevant evidence regarding the incompetency ruling concerning Samuel Wilson in 1976. Defense counsel's first remark stating that the defendant was charged as a juvenile "back then," indicated to the jury that there had been prior proceedings in this matter, and that they had been conducted in juvenile court. Counsel's later reference, to the effect that "Leroy was charged as a juvenile *the first time around*," indicated not only that there had been prior juvenile proceedings, but implied that there had been a complete round of prior proceedings, and even went so far as to imply that there had been a prior trial. It is respectfully submitted that it is improper for the defense attorney to refer to prior proceedings in an attempt to evoke the sympathy of the jury for the defendant, on the theory that the defendant is being persecuted. *Arizona* v. *Washington*, 434 *U.S.* 497, 499-500, fn.3, 510-511; *State* v. *Blanks*, 190 *N.J. Super.* at 278, 463 *A.*2d at 364.

The determination by a juvenile court in 1976 that a five year old witness was not competent to testify because he was too young to understand the oath to tell the truth, is irrelevant in a trial conducted at the present time, and constitutes hearsay. Moreover, when the jurors hear the word "incompetent," they will almost certainly jump to erroneous conclusions about the significance of that word in this context. In point of fact, the court in 1976 found that Samuel Wilson had the mental capacity to testify about the incident, but ruled him incompetent because he did not understand the significance of his oath to tell the truth. Defense counsel's goal was to make the jury believe that the spontaneous identification of the defendant at the scene by Samuel could not be believed

because the court had ruled him incompetent, which would be deceptive under these circumstances. This is especially so, since the on-scene identification would be admissible under *New Jersey Evidence Rule* 63(4) as a spontaneous and contemporaneous statement to the police even though the witness was incompetent because of his age at the time it was made. *State in The Interest of C.A., a Juvenile*, 201 *N.J. Super.* 28, 31-32, 492 *A.*2d 683, 685 (App. Div. 1985). Introducing the incompetency ruling would have made it necessary to explain the various ramifications of the ruling to the jury, which would have focused their attention on the legal aspects of the case and would have diverted their attention from the factual aspects. Moreover, the evidence of the incompetency ruling would have unfairly prejudiced the jury against the State's case, both in terms of the evidence of the original on-scene identification and the present day testimony of Samuel Wilson, who was eighteen at the time of trial and thus competent to testify.

Although defense counsel could obviously cross-examine the witness as to any statements he made at the 1976 hearing, the judge's determination is itself irrelevant. It would also be irrelevant and improper, for example, if the State were to call the prior judge as a witness and to ask him whether, despite his 1976 ruling on the incompetency issue, he in fact believed that Samuel Wilson had been telling the truth in 1976.

In *State* v. *Zamorsky*, 159 *N.J. Super.* 273, 387 *A.*2d 1237 (App. Div. 1978), the Court reversed the conviction because the trial judge's explanation to the jury of his purpose in interrogating the child witness prior to her testifying (*i.e.*, to assure her competency) acted as an implied endorsement of the child's credibility as a witness. 159 *N.J. Super.* at 281, 387 *A.*2d 1230-1231; see also *State* v. *Zamorsky*, 170 *N.J. Super.* 198, 200, 406 *A.*2d 192, 193-194 (App. Div. 1979). Although *Zamorsky* involved an implied endorsement of credibility rather than a stated finding of incompetency, the

principle is the same. The jury must judge the facts as they find them, without relying on the trial judge's opinions as to credibility or quality of testimony.

In *State* v. *Tirone*, 64 *N.J.* 222, 227-228, 314 *A.*2d 601, 604-605 (1974), a police officer had taken information from a rape victim and had signed a municipal court complaint charging assault with intent to rape. The Grand Jury ultimately indicted on one count each of rape and assault with intent to rape. At trial, after thoroughly cross-examining the officer as to the oral statements made to him by the victim, the defense attorney attempted to cross-examine him about his having signed a complaint charging only assault with intent to rape, and not charging rape. The New Jersey Supreme Court upheld the trial court's exclusion of this cross-examination on the ground that the complaint was irrelevant, since the trial was being conducted on the basis of the Grand Jury indictment charging the defendant with rape and assault with intent to rape. Thus, the defense attorney was permitted to cross-examine the officer as to the factual material presented to him by the victim, but was not permitted to cross-examine the officer as to any legal conclusions he may have drawn on the basis of that material.

In an analogous situation, a court which has ruled that a statement by defendant to the police is voluntary, cannot so inform the jury. *New Jersey Evidence Rule* 8(3); *State* v. *Hampton*, 61 *N.J.* 250, 294 *A.*2d 23 (1972). In *State* v. *Bowman*, 165 *N.J. Super.* 531, 398 *A.*3d 908 (App. Div. 1979), the Court reversed a conviction because the prosecutor had told the jury that the judge had found the statement to be voluntary. See also *State* v. *Humphrey*, 183 *N.J. Super.* 580, 444 *A.*2d 1135 (Law Div. 1982) (in trial for receiving stolen property, court cannot inform jury that it has made a finding, of clear and convincing evidence of prior offenses of receiving stolen property, which gives rise to a presumption of knowledge that the goods were stolen, under *N.J.S.A.* 2C:20).

It is improper to refer a trial jury to prior factual determinations, according to *State* v. *Blanks, supra,* where the Court observed:

> The State and defendant equally have an interest in exclusion of improper evidence. Here we have a witness who with deliberation was seeking the opportunity to intrude the determination of another jury into this case. (190 *N.J. Super.* at 278, 463 *A.*2d at 364.)

The *Blanks* court, which relied on *Arizona* v. *Washington, supra,* and *Gori* v. *U.S., supra,* upheld the declaration of a mistrial when a separately tried co-defendant informed the jury of his prior acquittal, and permitted re-trial.

In the instant case, it is respectfully submitted that the trial jury must be permitted to make its own factual determination on the basis of the testimony presented to them, not on the basis of the observations and findings of a judge in a prior hearing held for a limited and specialized purpose. The only relevant matters to be presented to the jury are the facts.

It is respectfully submitted that by ruling that double jeopardy barred a re-trial, the New Jersey courts have decided this matter in a way contrary to the decisions in *Arizona* v. *Washington, supra, U.S.* v. *Dinitz, supra,* and *U.S.* v. *Pridgeon, supra.* In all three of those cases, a mistrial was provoked by the defendant, and resulted from no improper action on the part of the prosecutor. Moreover, in *Arizona* v. *Washington,* a murder case, and *U.S.* v. *Dinitz,* the mistrial was granted during opening statements, and in *U.S.* v. *Pridgeon* it was granted after the trial had proceeded for a very short time. In all three cases, it was held that re-trial should be permitted, since the prejudicial effect of repeating the early stages of the trial was slight, and the prosecution should not be prejudiced by the improper actions of the defendant in causing the mistrial. Likewise, in the instant case, the mistrial was provoked in large part by the actions of the defendant,

with some responsibility being attributed to the actions of the trial court, and no responsibility being attributed to the prosecutor. Furthermore, the trial had proceeded a very short time, through relatively brief jury selection proceedings and part of the opening statement period. For this reason, re-trial should not be barred.

Moreover, in the instant case, the record does indicate that the trial judge weighed the effect of the defense attorney's remarks and the other stated factors on the jury, and considered giving a curative instruction, but found that it would have been inadequate (App. C-6; App. D-4 to 5).

This is similar to the situation in *Arizona* v. *Washington, supra,* where the court held:

> We recognize that the extent of the possible bias cannot be measured, and that the District Court was quite correct in believing that some trial judges might have proceeded with the trial after giving the jury appropriate cautionary instructions. In a strict, literal sense, the mistrial was not "necessary." Nevertheless, the overriding interest in the evenhanded administration of justice requires that we accord the highest degree of respect to the trial judge's evaluation of the likelihood that the impartiality of one or more jurors may have been affected by the improper comment. (434 *U.S.* at 511.)

Likewise, in *State* v. *Blanks* the New Jersey Appellate Division held:

> We conclude that the judge scrupulously considered the only real alternative, a curative instruction, and found it wanting. See *Bruton* v. *U.S.*, 391 *U.S.* 123, 129, 88 *S.Ct.* 1620, 1624, 20 *L.Ed.* 2d 476 (1968), where the Supreme Court observed that in certain circumstances, a curative instruction in a criminal trial may be "a futile collocation of words" and its effectiveness a "naive assumption." We seriously

> doubt that any jury instruction could erase the offending remark by Robinson about his prior acquittal or enable the jury to deliberate on defendant's fate without considering that defendant's alleged cohort had been freed by an earlier jury which rejected virtually the same quality of identification testimony offered against him. (190 *N.J. Super.* at 278, 463 *A.*2d at 364.)

A major point of contention regarding the mistrial motion was that the defense had attempted to introduce improper evidence regarding prior proceedings and factual findings. In deciding this appeal, the Appellate Division expressly declined to determine this issue (App. B-15). This had the effect of avoiding the issue of whether the defendant in fact provoked the mistrial. In its opinion, the Appellate Division evinced a reluctance to express disapproval of the defendant's proffered evidence, a reluctance which was not in evidence at the oral argument before this panel.

By refusing to decide this issue, the Appellate Division has effectively skewed its analysis of the situation which resulted in the mistrial, thus ignoring an important factor which would lend weight to the State's position. *Arizona* v. *Washington, supra*; *U.S.* v. *Dinitz, supra*; *State* v. *Pridgeon, supra*; and *State* v. *Blanks, supra.* In all of these cases, the Court in allowing retrial considered the fact that the mistrial had been brought about by the actions of the defendant, which is an important policy consideration recognized by the court in *Arizona* v. *Washington, supra*:

> An improper opening statement unquestionably tends to frustrate the public interest in having a just judgment reached by an impartial tribunal. Indeed, such statements create a risk, often not present in the individual juror bias situation, that the entire panel may be tainted. The trial judge, of course, may instruct the jury to disregard the improper comment. In extreme cases, he may discipline counsel,

> or even remove him from the trial as he did in *United States* v. *Dinitz*, 424 *U.S.* 600, 47 *L.Ed.* 2d 267, 96 *S.Ct.* 1075. Those actions, however, will not necessarily remove the risk of bias that may be created by improper argument. Unless unscrupulous defense counsel are to be allowed an unfair advantage, the trial judge must have the power to declare a mistrial in appropriate cases. The interest in orderly, impartial procedure would be impaired if he were deterred from exercising that power by a concern that anytime a reviewing court disagreed with his assessment of the trial situation a retrial would automatically be barred. The adoption of a stringent standard of appellate review in this area, therefore, would seriously impede the trial judge in the proper performance of his "duty, in order to protect the integrity of the trial, to take prompt and affirmative action to stop . . . professional misconduct." Id., at 612, 47 *L.Ed.* 2d 267, 96 *S.Ct.* 1075. (434 *U.S.* at 512-513.)

The Appellate Division avoided having to confront the decisions in *Arizona* v. *Washington, U.S.* v. *Dinitz,* and its own case of *State* v. *Blanks,* by declining to decide whether the statements made by or the evidence proffered by the defense attorney would have been legally admissible. It is respectfully submitted that the New Jersey Courts should not be permitted to circumvent the United States Supreme Court by declining to decide an issue which is central to the inquiry.

It is respectfully submitted that the above factors created a manifest necessity to abort the trial. Furthermore, when the trial judge ruled at side bar that the defendant would be permitted to introduce a prior determination regarding the incompetency of a witness, a fair trial for the State became impossible. Although a stronger manifest necessity argument could be made if the Court had actually allowed the jury to hear about the prior incompetency ruling, it is not necessary

for the case to have proceeded that far in order to justify the declaration of a mistrial. *Gori* v. *U.S., supra.*

In *Gori,* the U.S. Supreme Court held that a re-trial was not barred where the initial trial had been terminated by the trial judge *sua sponte* because the judge got the impression that the government attorney was attempting to insinuate to the jury, by his manner of examining a government witness, that the defendant had been convicted of other crimes, even though no such question was put to the witness specifically, and the record did not reveal that that was the intention of the government attorney. The United States Supreme Court deferred to the discretion of the trial judge in his determination that there was a need to terminate the trial. Likewise, it is respectfully submitted that this Court should defer to the discretion of the trial judge in his determination that there was a manifest necessity to terminate the trial in the instant case. Once again, it should be noted that the Appellate Division did not cite or acknowledge the *Gori* case, which it had relied upon in its own case of *State* v. *Blanks, supra,* which was also conspicuously absent from its opinion in the instant case.

In discussing the burden of demonstrating manifest necessity which is placed on the prosecutor in a case where a mistrial was declared over the objection of the defendant (and the Court will note that there was no objection in this case), the Court in *Arizona* v. *Washington* held as follows:

> The words "manifest necessity" appropriately characterize the magnitude of the prosecutor's burden. For that reason Mr. Justice Story's classic formulation of the test has been quoted over and over again to provide guidance in the decision of a wide variety of cases. Nevertheless, those words do not describe a standard that can be applied mechanically or without attention to the particular problem confronting the trial judge. Indeed, it is manifest that the key word "necessity" cannot be interpreted literally;

> instead, contrary to the teaching of Webster, we assume that there are degrees of necessity and we require a "high degree" before concluding that a mistrial is appropriate. (434 *U.S.* at 505-506.)

Moreover, in the instant case the trial court acknowledged that by its first incorrect ruling indicating an inclination to admit evidence regarding the prior incompetency finding, it had put the State in a difficult position which had precipitated the motion for a mistrial (App. D-5 to 7). It is respectfully submitted that the trial court's comments and rulings did put the State in an awkward position, and that the people of New Jersey should not be prejudiced in their prosecution of this defendant because of lack of clarity on the part of the trial court. In this regard, the Court should note the decision in *U.S.* v. *Sedgwick, supra.*

In that case, shortly before the government completed its case, certain previously undisclosed government evidence was revealed. The trial court, erroneously ruling that this was material evidence and should have been disclosed, declared a mistrial over defendant's objection, to allow further investigation. The District of Columbia Court of Appeals held that re-trial was not barred, despite the fact that the mistrial had been based on an erroneous ruling. The United States Supreme Court denied *certiorari.*

It should further be noted that before determining this issue without the benefit of *Arizona* v. *Washington, Gori* v. *U.S.*, or *U.S.* v. *Dinitz*, the Appellate Division went out of its way to by-pass a more immediate issue which should have disposed of the case in favor of the State. As the record indicates, the defendant never objected to the mistrial or to the discharge of the jury. The defendant did not pose an objection to the State's first motion for mistrial, which listed only one ground (introduction of the prior incompetency ruling; Appendix C-1 to 2), although the record does not necessarily indicate that the defendant had an opportunity to object before the trial judge denied the motion. However, the State

later moved for mistrial on the basis of the ground originally advanced, as well as three other grounds (reference to a prospective explanation for the thirteen year delay, erroneous instructions that the jury could not ask for clarification as to testimony or any factual matters, and reference to prior juvenile proceedings; App. C-3 to 5) which had not been advanced previously as grounds for mistrial.

The following exchange then took place:

THE COURT: All right. Thank you. Mr. Faulk, any response?

MR. FAULK: Nothing, Your Honor, no. (Appendix C-5.)

The defendant's failure to object dictated that termination was not improper, under *N.J.S.A.* 2C:1-9d(1), which codifies case law by providing that termination of a trial is not improper, and therefore re-trial is not barred by double jeopardy principles, if the defendant consents to the termination or waives, by motion to dismiss or otherwise, his right to object to the termination. This standard was recognized by the United States Supreme Court in *Arizona* v. *Washington*: "The prosecutor must demonstrate 'manifest necessity' for any mistrial declared over the objection of the defendant." 434 *U.S.* at 505.

The Appellate Division stated, "Defendant's attorney successfully argued against the motion before lunch and had no reason to believe that additional argument was necessary when the assistant prosecutor repeated the motion after lunch." The opinion goes on to say that nothing in the record suggests that the defense attorney had withdrawn his opposition to a mistrial, which he had previously expressed. (App. B-13.) As noted above, there was no previous expression of opposition. Moreover, this sentence ignores the fact that additional grounds had been advanced as the basis for the motion after lunch. Although these grounds had been mentioned in other contexts before lunch, they had not been

advanced as grounds for the original motion for mistrial. Moreover, when the State made its mistrial motion after lunch, the judge gave the defense attorney a clear opportunity to object. The defense attorney's response was, "Nothing, Your Honor, no." How the Appellate Division can derive from this remark an objection is beyond comprehension. Moreover, the significance of an objection or the absence thereof was recognized by the court in *Arizona* v. *Washington, supra*, as noted above. 434 *U.S.* at 505.

Furthermore, the defendant never objected to the discharge of the jury. In particular, when the defendant moved to dismiss the indictment on grounds of double jeopardy following the granting of the mistrial motion, he did not object to the discharge of the jury. Rather, he regarded the jury (which had not yet been brought back into the courtroom) as already having been dismissed (Appendix C-6), and the closest he came to objecting to the discharge of the jury was by virtue of the following remark:

> MR. FAULK: I assume we are going to bring the jury back and tell them and give them the good news? (App. C-9.)

By failing to object, the defendant waived his right to object to the termination, thereby making it a proper termination posing no bar to re-trial. By moving immediately after the grant of the mistrial to dismiss the indictment on the basis of double jeopardy (App. C-6), the defendant did nothing to change the fact that he had not objected to the State's motion for a mistrial. Rather, the defense attorney merely moved to dismiss the indictment on grounds of double jeopardy, once the judge had granted the motion for a mistrial, and even then did not object to mistrial or discharge of the jury, and did not seek a stay to appeal the ruling, showing a possible intention to provoke the mistrial in the first place. Thus, the termination was proper, and re-trial is not barred. *Arizona* v. *Washington*, 434 *U.S.* at 505.

On this point, the bias of the Appellate Division is made clear by the following sentence: "Without being given any warning that the judge had second thoughts about his earlier ruling, defendant's attorney could not have anticipated that the judge would reverse himself." (App. B-13.) Neither *N.J.S.A.* 2C:1-9d(1), New Jersey case law, nor federal case law requires that the judge give any warning as to how he intends to decide the mistrial motion, in order to allow a defense attorney to determine whether or not to object. None of the above sources contains any authority for the proposition that the words "Nothing, Your Honor, no" shall constitute an objection in any instance where the trial judge has not made clear in advance of his ruling what the nature of that ruling will be.

Rather than relying on this clear absence of a formal objection to allow the very brief preliminary stages of the trial to be repeated, so as to advance the interests of justice by letting the matter be decided by a jury, the Appellate Division bent over backwards to find an objection where there was none in the record.

There was no evidence in the record that the State's case had "turned sour." There was no evidence in the record that the State, for any reason, disclosed or undisclosed, was not able to proceed. The Appellate Division decided that the State's motion for mistrial suggested that the above circumstances existed and held that, "Re-trying a criminal defendant in those circumstances strikes directly at the core of his constitutional right to be free of a second prosecution for the same offense . . . ," citing a New Jersey case in which the prosecution was not able to proceed because of the unavailability of a critical witness. (App. B-16). In point of fact, the State in the instant case had to send home its first witness, who was waiting in a conference room down the hall, and had traveled sixty miles that morning to testify. Moreover, all of the State's civilian, police, and expert witnesses were available and prepared to testify, and the prosecutor was prepared

to proceed. It is absolutely improper for the Appellate Division to speculate on the State's motives and then to use the results of its speculation as a ground for deciding against the State, in order to avoid the issue of defense responsibility for the mistrial. Had they faced this issue, the cases of *Arizona* v. *Washington*, *supra*, *U.S.* v. *Dinitz*, *supra*, *U.S.* v. *Pridgeon*, *supra*, and *State* v. *Blanks*, *supra*, would have required the Appellate Division to permit a re-trial.

It should be emphasized that the record does not contain any indication of any misconduct by the State. Even in those cases where there has been prosecutorial error or misconduct or judicial error, our courts have refused to bar a re-trial, as long as there was no evidence of overreaching or bad faith. Such cases include *Gori* v. *U.S.*, *supra*, (improper questions by the prosecutor prompted judge's *sua sponte* mistrial motion); *Lee* v. *U.S.*, 423 *U.S.* 23 (1977) (at end of bench trial, court granted defendant's motion, made after government's opening statement, to dismiss information for failure to allege required elements of offense); *Illinois* v. *Somerville*, 410 *U.S.* 458 (1973) (court found "manifest necessity" where trial judge, following swearing of jury, granted State's motion for mistrial, over defendant's objection, because of technical defect in indictment); *State* v. *DeMarco*, 211 *N.J. Super.* 421, 511 *A.*2d 1251 (App. Div. 1986) (defendant's mistrial motion granted because prosecutor referred to hearsay in opening statement); *Oregon* v. *Kennedy*, 456 *U.S.* 667 (1982) (court granted defendant's mistrial motion after prosecutor's question to witness characterized defendant as a "crook"); *U.S.* v. *Green*, 636 *F.*2d 925 (Fourth Cir. 1980), *cert. den.* 451 *U.S.* 929 (1981) (court granted defendant's mistrial motion after government agent testified that defendant had been in custody on a prior charge); *U.S.* v. *Beasley*, 479 *F.*2d. 1124 (Fifth Cir. 1973) (court granted defendant's mistrial motion based on improper cross-examination by prosecutor).

Given that re-trial was allowed in the above cases where the prosecutor was responsible for the granting of a mistrial, it

is respectfully submitted that re-trial should be permitted in the instant case where the prosecutor was not responsible for the mistrial situation, and the defense attorney was. *Arizona* v. *Washington, supra, U.S.* v. *Dinitz, supra, U.S.* v. *Pridgeon, supra.*, and *State* v. *Blanks, supra.*

It is respectfully submitted that the Court should give deference to the trial court's exercise of discretion in determining that there was a manifest necessity to terminate this trial. As the Court in *Arizona* v. *Washington* stated:

> There are compelling institutional considerations militating in favor of appellate deference to the trial judge's evaluation of the significance of possible juror bias. He has seen and heard the jurors during their voir dire examination. He is the judge most familiar with the evidence and the background of the case on trial. He has listened to the tone of the argument as it was delivered and has observed the apparent reaction of the jurors. In short, he is far more "conversant with the factors relevant to the determination" than any reviewing court can possibly be. See *Wade* v. *Hunter,* 336 *U.S.* 684, 687, 93 *L.Ed.* 974, 69 *S.Ct.* 834. (434 *U.S.* at 513-514.)

The Court's attention should be drawn finally to the case of *Wade* v. *Hunter, supra,* which held that re-trial was not barred, where the initial trial had proceeded almost to a conclusion, and was interrupted and re-started because of changes in the deployment of troops in a war zone, coupled with an Army policy regarding the trial of cases in the vicinity of the offenses. That Court held that although the defendant has a right to have his case decided by the first jury empaneled, in some instances that right must be subordinated to the public's interest in fair trials designed to end in just judgments. 336 *U.S.* at 688-698 (1949). See also *Arizona* v. *Washington* which cites *Wade* v. *Hunter* on this same point at 434 *U.S.* at 515-516.

2. THE INTERESTS OF JUSTICE DEMAND THAT A RAPE/MURDER CASE BE PRESENTED TO A JURY FOR A FACTUAL DETERMINATION, RATHER THAN DISPOSED OF ON TECHNICAL PROCEDURAL GROUNDS.

The interest of justice requires certification. A murder indictment has been dismissed. The New Jersey Supreme Court and the Appellate Division of the New Jersey Superior Court have, in effect, stated to the people of the State of New Jersey and of the United States in general, and to the victim and her family in particular, that the burden placed on the defendant by having him sit for a second time through the jury selection process, the prosecutor's opening statement, and the first part of his own attorney's opening statement, outweighs the public interest in having a rape/murder case determined by a jury. This is a situation where form has been placed over substance, and the result is a horrible injustice. At a time when the public's confidence in the legal system has reached its nadir, this decision does nothing to change the general perception that criminal defendants, regardless of the crime or the strength of the evidence against them, can usually manage to get off on a technicality. In this case, it is even worse than usual because the defense attorney's attempt to introduce improper evidence provoked the mistrial which resulted in dismissal, showing the public and other defense attorneys that improper tactics by the defense are richly rewarded. Although the result of submitting evidence to a jury is never a foregone conclusion, it is in the public interest to have a jury hear the relevant facts in this case and make a factual determination. Moreover, the defendant has never alleged any specific prejudice.

A charge of murder has been treated in a special manner within our legal system. Under New Jersey law there is no statute of limitations on murder. Murder is considered to be such a heinous crime against the individual victim and against society that the passage of time between the event and

the institution of prosecution will not invalidate the prosecution. This situation exists despite any due process arguments which a defendant might advance with respect to his increased burden to defend the charge years after it allegedly had occurred. The balance weighs in favor of having a factual determination regarding guilt.

Considering the seriousness of the crime and the seriousness with which our legal system has traditionally viewed it, justice demands that the balance be weighed in favor of a retrial where a defendant has provoked the mistrial and the first trial did not last beyond opening statements. The additional burden placed on the defendant to start a trial is minimal compared with the tremendous blow that is dealt to society by disposing of a murder charge on technical procedural grounds, especially when this disposition was provoked by the court and by the defendant, and resulted from a blatant refusal by the New Jersey Supreme Court and the Appellate Division of the New Jersey Superior Court to acknowledge the United States Supreme Court and the United States Court of Appeals cases on point, as well as a relevant Appellate Division opinion written by one of the judges on the present panel.

On this same point, some sense of perspective can be gained by turning to the dissenting opinion of Mr. Justice Powell in *Crist* v. *Bretz,* 437 *U.S.* 28 (1978), which contains an historical account of the development of the double jeopardy principle and the process by which various other requirements, not fundamentally related to that principle, have been grafted onto it. One such addition is the right to have the case determined by the first factfinder selected, a right which would be given no deference had a defendant elected a bench trial before a certain judge, only to find that the case had later been re-assigned to a different judge. This opinion also followed the development of our law from the point of forbidding two complete trials for the same offense to

the present day idea that jeopardy attaches at the swearing of the jury.

Regarding the right to have the case determined by the first factfinder selected, the court should note the following language from *U.S.* v. *Dinitz*, 424 *U.S.* 600, 96 *S.Ct.* 1075 (1976), where the Court stated in Footnote 11 at 96 *S.Ct.* 1080:

> The respondent characterizes a defendant's mistrial motion as a waiver of "his right not to be placed twice in jeopardy" and argues that to be valid, the waiver must meet the knowing, intelligent, and voluntary standard set forth in *Johnson* v. *Zerbst*, 304 *U.S.* 458, 58 *S.Ct.* 1692, 82 *L.Ed.* 1461. This approach erroneously treats the defendant's interest in going forward before the first jury as a constitutional right comparable to the right to counsel. It fails to recognize that the protection against the burden of multiple prosecutions underlying the constitutional prohibition against double jeopardy may be served by a mistrial declaration and the concomitant relinquishment of the opportunity to obtain a verdict from the first jury. This Court has implicitly rejected the contention that the permissibility of a re-trial following a mistrial or reversal of a conviction on appeal depends on a knowing, voluntary, and intelligent waiver of a constitutional right. See *Breed* v. *Jones*, 421 *U.S.* 519, 534, 95 *S.Ct.* 1779, 1788, 44 *L.Ed.* 2d 346, 358; *United States* v. *Wilson*, 420 *U.S.* 332, 343-344, n. 11 95 *S.Ct.* 1013, 1021-1023, 43 *L.Ed.* 2d 232, 242-243; *United States* v. *Jorn*, 400 *U.S.* 470, 484-485, n. 11. 91 *S.Ct.* 547, 556-557, 27 *L.Ed.* 2d 543, 556-557 (plurality opinion); *United States* v. *Tateo*, 377 *U.S.*, at 466, 84 *S.Ct.*, at 1589, 12 *L.Ed* 2d, at 450.

The point of the State's above citations to *U.S.* v. *Dinitz* and *Crist* v. *Bretz* is to demonstrate to the Court that, on

viewing the overall picture, the defendant's *fundamental* double jeopardy rights would not be violated by permitting a retrial in this matter. Given that the original purpose of the double jeopardy clause was to avoid double punishments and to avoid putting a defendant through two complete trials, it is respectfully submitted that causing the defendant to repeat the brief trial procedures undertaken in this case would place a relatively small burden on him, one which certainly would not have been recognized as a significant burden by the drafters of the Constitution. The drafters of the Constitution, as well as any ordinary citizen with common sense, would also be shocked at the idea that a defendant who has been identified by eye-witness accounts and physical evidence as a rapist/murderer should be set free without a complete jury trial, rather than placing on him the burden of repeating the preliminary trial procedures which were held before he provoked a mistrial.

CONCLUSION

For the above reasons, it is respectfully submitted that a Writ of Certiorari should issue to review the decisions of the New Jersey Supreme Court and the Appellate Division of the New Jersey Superior Court.

Respectfully submitted,

RICHARD E. HICKEY, III
GLOUCESTER COUNTY
PROSECUTOR

By: /s/ JOHN A. MENNITE
JOHN A. MENNITE
ASSISTANT PROSECUTOR

DATED: 12-22-89

APPENDIX A

ORDER OF THE SUPREME COURT OF NEW JERSEY DENYING CERTIFICATION

STATE OF NEW JERSEY, *Plaintiff-Petitioner,* vs. LEROY HOWARD, *Defendant-Respondent.*	SUPREME COURT OF NEW JERSEY C-295 September Term 1989 30,972

To the Appellate Division, Superior Court,

A petition for certification of the judgment in A-1998-85T5 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied.

WITNESS, the Honorable Robert N. Wilentz, Chief Justice, at Trenton, this 31st day of October, 1989.

CLERK OF THE SUPREME COURT

I hereby certify that the foregoing
is a true copy of the original on file
in my office.

CLERK OF THE SUPREME
COURT OF NEW JERSEY

APPENDIX B

OPINION OF
THE NEW JERSEY SUPERIOR COURT,
APPELLATE DIVISION REPORTED AT
235 N.J. SUPER. 243, 561 *A.* 2D 1202 (App. Div. 1989)

STATE OF NEW JERSEY, *Plaintiff-Respondent,* v. LEROY HOWARD, *Defendant-Appellant.*	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION A-1998-88T5

Argued May 24, 1989 — Decided August 7, 1989

Before Judges King, Brody and Ashbey.

On appeal from Superior Court of New Jersey, Law Division, Gloucester County.

Warren W. Faulk argued the cause for appellant (Brown & Connery, attorneys; Mr. Faulk, of counsel and on the brief).

John A. Mennite, Assistant Prosecutor, argued the cause for respondent (Richard E. Hickey, III, Gloucester County Prosecutor, attorney; Mr. Mennite, of counsel and on the brief).

The opinion of the court was delivered by

BRODY, J.A.D.

We granted defendant leave to appeal an order denying his motion to dismiss this murder indictment on the ground of double jeopardy. The trial judge had granted the State's motion for a mistrial, made during defendant's attorney's opening statement. Shortly thereafter the judge denied defendant's motion and discharged the jury. The issues are

whether defendant had consented or waived objection to the mistrial and if not, whether there was a "sufficient legal reason and a manifest or absolute or overriding necessity" for the judge to have declared the mistrial. *N.J.S.A.* 2C:1-9d(1) and (3). We conclude that defendant had not consented to the mistrial, that there was no necessity at all to declare the mistrial, and that the order denying defendant's motion for dismissal of the indictment must therefore be reserved.

The unusual history of this case caused the problems that led the judge to declare the mistrial. The victim, a young woman, was killed in her home in December 1975 when defendant was 16 years old. Defendant was immediately taken into custody by the police, but not indicted until 1984 and not tried until 1988. The delay between indictment and trial was caused by legal proceedings, including a prior appeal, in which defendant challenged the State's right to proceed to trial. He argued in those proceedings that the lengthy delay between the crime and the indictment denied him due process because an alleged alibi witness had died in the interim. He also argued that the State should be barred from introducing the results of a test that purported to establish that blood stains on his underwear were the same blood type as the victim's, whose blood was a different type from defendant's.[1] He complained that he could not confirm the test results because the State had destroyed the stains in the test.

The State's key witness was the victim's son Sam who allegedly saw the homicide and immediately identified defendant to the police as the killer. Sam was only 5 years old when his mother was killed, thereby raising a question as to his competence to testify. That issue was tried in the Juvenile and Domestic Relations Court shortly after defendant was taken into custody, when the State moved to have him tried as an adult. The judge who conducted the referral hearing in

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[1] There is evidence that the killer had sexually assaulted the victim.

January 1976 ruled that Sam was not competent to testify. After the boy had testified and identified defendant in court, the judge found:

> . . . I cannot be sure to a moral certainty that the boy does not know either the importance of what he is saying or the importance of giving the right testimony rather than the wrong testimony. I cannot say to any degree of certainty that he is unduly subject to suggestion because I know of no way of measuring this. But the matter under consideration is far too serious for the Court to guess as to firstly, whether he knows what he is saying and secondly, the importance of saying only the truth. My personal information [inclination?] is, he does know what he is saying but I cannot say to a degree of certainty that he knows what will happen to him either in this world or the next if he should willfully or unwittingly tell an untruth. I, therefore, am reluctantly persuaded to the conclusion that his testimony should not be accepted.

The judge nevertheless referred the matter to the Law Division so that criminal proceedings could be brought against defendant as an adult.

The matter was presented to a grand jury without Sam's testimony or statements, which the State considered barred by the court's ruling that Sam was incompetent to testify. The grand jury declined to indict and defendant was released. Defendant contended in the later proceedings that the State intentionally withheld evidence of guilt from the grand jury to assure a no bill in order to keep the matter open until Sam became old enough to qualify as a witness. The State responded that it revived the matter years later because a detective who had been assigned to other matters in the intervening years continued to be interested in the case.

In any event, these circumstances produced evidence questions that were bound to be raised at the 1988 trial.

Defendant wanted the jury to know that the State's key witness had been ruled incompetent to testify in 1976 and that the State had used the device of waiting for the boy to age in an attempt to overcome his allegedly inherent lack of credibility. The State, on the other hand, considered the prior ruling respecting Sam's competence to testify to be irrelevant.

The trial judge ruled that he had to grant the State's motion for a mistrial because the jury had become unfairly prejudiced by the cumulative effect of four events that occurred during trial. One of those events occurred during jury selection, one after the jury had been sworn and before opening statements, one during defendant's attorney's opening statement and the last during a colloquy with counsel outside the presence of the jury.

The first event occurred on a Friday morning while the last three members of the jury were being selected from a new panel. Although we have been given a transcript of only that day's proceedings, we infer from statements in that transcript that earlier during the jury selection defendant had expressed concern that prospective jurors would erroneously speculate that defendant had delayed the trial for over a decade by being a fugitive. On the other hand, the State had expressed concern that prospective jurors would erroneously speculate that the State had unfairly kept defendant in jail all that time.

To allay both concerns, the judge told the prospective jurors Friday morning:

> So, I'll tell you that, and during the trial, during the testimony it will develop — probably it will develop, and you will be satisfied as to the explanation of the delay. So, I want to let you know, though, that the defendant hasn't been out of the state. He hasn't been a fugitive. He hasn't fled. He's been available at all times. Also, and he's been available not because he has been in jail. He has not been in

> jail. He's not been incarcerated. He's not been confined, okay? All right.

The assistant prosecutor, anticipating defendant's attorney's efforts to blame the State for the delay, objected at sidebar to the judge's comment that the prospective jurors would "be satisfied as to the explanation of the delay." He complained that the remark unfairly burdened the State with an obligation to account to the jury for the delay.

The judge satisfied the objection by immediately addressing the jury as follows:

> I will repeat that the event is supposed to have occurred — the murder was supposed to have occurred December 30, 1975, and that is 13, almost 13 years ago, and let me ask, would the delay or the time that it is alleged that this happened, December, 1975 to today, the time of trial, would that 13-year delay — and I don't use delay to indicate that someone was responsible and has to prove or disprove what they have done or have not done to bring the case to trial, but would that period of time, the lapse from the time it is supposed to have happened to the present time, would that influence anyone here? Would that cause you to be unable to fairly judge the defendant and the State in this matter, the fact that it's been 13 years? All right I see no hands raised.
>
> I want to make certain that in that delay the Prosecutor need not justify that delay. The defendant need not justify that delay either. If it develops during the trial, fine. By fine I mean it will be evidential if it comes out at trial, but you are not at this moment to consider that period of time, that 13-year period of time. You are not to consider that. Only in respects that I asked you, would it influehce you in this case? And I didn't see any hands raised.
>
> I think that covers it, counsel?

[ASSISTANT PROSECUTOR]: Thank you, Your honor.

[DEFENDANT'S ATTORNEY]: Yes.

The second event occurred after the jury had been sworn and before opening statements. The judge was giving the jury some preliminary instructions when he said the following:

> Bear in mind this, you are the judges of the facts, and you are the ones who will determine what weight, what believability, what credibility you will give to the testimony and the evidence, whether it is in the form of testimony from the witness stand or evidence of exhibits. So, you will be the judges of the facts, and the jury is to be concerned about the facts of the case, and at the end of the case when you are deliberating, it would be — well, you can ask the question, but I would have to return the answer to you, that you must use your own recollection. If you ask me a question, which you are permitted to do in writing, if you ask me a question while you are deliberating, could you tell us what witness X said, or did witness X say this? And my answer must be to you, you are the judges of the facts. You must recall what the evidence was and what the testimony was, and I am the judge of the law. You are the judge of the facts.

After the jury had been excused for its midmorning recess, the assistant prosecutor made the following comment in the form of a caution rather than an objection:

> Prior to the recess, Your Honor gave some general instructions to the jury, and included in those instructions were instructions to the effect that the jury was — the jury was to, as the judge of the facts, and the jury — if jury members had questions with certain testimony, and were to ask the Court about what that witness said, the Court would tell them to

> rely on their recollection. That is one course that is open to the Court. There are cases that do permit testimony read backs.
>
> I'm putting this on the record, because I would ask the Court to be guided by it in the future dealings with the jury, because I don't — since we are engaged in a search for the truth, I don't want to discourage the jury from asking about testimony. It could work to clarify their understanding, and to the benefit of either side, the prosecution or the defense, and because we are engaged in a search for the truth, I don't want to discourage them from that.

The judge responded:

> All right, at my regular instructions to the jury, I will mention to them that if the Court, after discussion with counsel, considers any situation necessary for testimony to be read back, the Court will do it, but it is not an automatic matter. It is a matter which the Court has discretion to permit or deny. I will mention it to them, certainly.

To which the assistant prosecutor responded, "Thank you."

The third event that the judge found contributed to the need for a mistrial was the following portion of defendant's attorney's opening statement made after he had urged the jury to remember that Sam was only 5 years old when the killing occurred, not the more mature 18-year-old who would be testifying:

> You have to imagine, you have to harken back that that was a five-year-old, and why? Because after this occurred, and after Leroy was charged as a juvenile the first time around, there was a hearing. There

> was a juvenile court hearing, and I represented him back then.

The assistant prosecutor interrupted with a request for a sidebar conference, which the judge granted. These were the last words of the trial that the jury heard before the judge discharged them later that afternoon.

At the sidebar conference, which was conducted just before lunch, the assistant prosecutor objected to allowing defendant's attorney to undertake "a review of all the prior proceedings," which he considered irrelevant. He called upon defendant's attorney to make an offer of proof. The offer produced the fourth event. The judge simply noted the third event when he declared the mistrial without stating why defendant's attorney's remarks to the jury contributed to the need for a mistrial.

The fourth event appears to be at the heart of the matter. Responding to the assistant prosecutor's request for an offer of proof, defendant's attorney stated that he was about to tell the jury that in 1976 a Juvenile and Domestic Relations Court judge had ruled that Sam was incompetent to testify. The assistant prosecutor objected, arguing that the prior ruling was irrelevant.

In the course of the argument that followed, defendant's attorney made the following point:

> Judge, you are going to have to instruct this jury that [the Juvenile and Domestic Court judge] entered an order finding that boy incompetent to testify 16 years ago; that that was a finding of fact and a finding of law in this case.

The assistant prosecutor described the argument of defendant's attorney as "ridiculous" and represented that he intended to call Sam as a witness to recount both his in-court

and out-of-court identification of defendant as the person who killed his mother:

> . . . Your Honor, the point is, the in-court identification falls into the same category as the out-of-court identification at the scene, because we are saying there was a young boy on December at the scene. That's the guy that shot my mother, and in January said in Court that's the guy that shot my mother.

The assistant prosecutor again insisted that the prior ruling was irrelevant and therefore requested the judge to order defendant's attorney not mention it.

The judge's entire ruling is as follows:

> All right, I think it's relevant because of the delay in this case. I think it is a factual situation. I will permit it.

The assistant prosecutor immediately moved for a mistrial. After brief remarks from both sides, including an argument in opposition to the motion from defendant's attorney, the judge denied the motion.

The assistant prosecutor then requested an opportunity to consider "whether to appeal this or not . . . ." The judge, indicating a willingness to stay the trial while the assistant prosecutor moved for leave to appeal, thereupon excused the jury for lunch so that the assistant prosecutor could consider his next move.

The trial resumed at 2:00 p.m. out of the presence of the jury. Instead of requesting a stay, the assistant prosecutor renewed his motion for a mistrial on the ground that the State was unfairly prejudiced by the cumulative effect of the four previously described events. When asked by the judge if he had "any response," defendant's attorney replied, "Nothing your honor, no."

The judge thereupon reversed himself and granted the State's motion for mistrial after delivering the following oral opinion:

> All right, there were several bases for the request for mistrial, and it may be, it may be that — I think there were five grounds alleged for a mistrial, centering mainly about the juvenile hearing and the testimony or non-testimony of the juvenile, the delay in the proceeding, the findings by the juvenile court, the instruction concerning the jury questions certainly can be corrected, and it may be that individually there may not be a basis for granting the motion, but combined, I think that the jury might have preconceived ideas or notions. I will grant the motion, but I'm going to ask that this matter resume tomorrow for the selection of the new jury. I'll grant the motion. Saturday, I'm sorry, yes.

Defendant's attorney immediately moved to dismiss the indictment "on the basis of double jeopardy." In the course of his argument, the attorney correctly pointed out that "[j]eopardy attached by virtue of the swearing of the jury . . . ." The assistant prosecutor's only argument against the motion to dismiss the indictment follows:

> Your Honor, I would oppose that motion. I would urge that among other things, the defense team's own action has been responsible for part of the problem here, and for that reason I would submit that it shouldn't be granted.

The judge denied the motion reasoning as follows:

> All right, I apparently by my ruling reversed myself, reversed my ruling. I have done some research over the noon hour, and that was the basis for the granting of the motion for the mistrial.

> The motion to dismiss on the grounds of double jeopardy, opposed by the prosecutor, I will deny at this time. Of course, counsel may take an appeal from that certainly, but the reason and the basis for that is, though the jury has been sworn, there has been no testimony adduced, placed either the State or the defendant in a position of — the defense in the position of offering testimony in this matter.
>
> The jury has been sworn, but that in and of itself is not the total and sole criteria, but I will postpone the scheduling this case from tomorrow to a date — if you wish to appeal the denial of your motion for dismissal of the indictment, Mr. [naming defendant's attorney].

In the course of additional colloquy the judge said that he still thought that defendant's attorney "could inquire as to" the 1976 incompetency ruling. That remark prompted the assistant prosecutor to seek a clear-cut ruling on the point or "[w]e will find ourselves in the opening statement [at the new trial] with the same problem all over again." The judge promised to consider the matter over the weekend and announce his decision the following Monday.[2] After this colloquy, the judge called the jury into the courtroom at 2:30 p.m. and discharged them.

In *State in Interest of D.P.*, 232 *N.J. Super.* 8 (App. Div. 1989), we recently reviewed the standards, codified in *N.J.S.A.* 2C:1-9d, for declaring a mistrial in a criminal case without thereby barring retrial because of the defendant's constitutional right to be placed in jeopardy only once for the same offense. *U.S. Const.*, Amend. V and XIV; *N.J. Const.*,

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[2] The judge stayed further proceedings the following Monday to enable defendant to take the present appeal. Before doing so, however, he reversed himself on the evidence question, ruling that defendant's attorney could not comment in his opening statement upon the 1976 competency ruling.

Art. I, § 11; *State* v. *Rechtschaffer*, 70 *N.J.* 395, 404 (1976); *State* v. *Farmer*, 48 *N.J.* 145, 168 (1966), cert. den. 386 *U.S.* 991, 87 *S.Ct.* 1305, 18 *L.Ed.*2d 335 (1967); *State* v. *Bowen*, 224 *N.J.Super.* 263, 273 n. 2 (App. Div. 1988). The statute provides in relevant part:

> A prosecution of a defendant for a violation of the same provision of the statutes based upon the same facts as a former prosecution is barred by such former prosecution under the following circumstances:
>
> * * * *
>
> d. The former prosecution was improperly terminated. Except as provided in this subsection, there is an improper termination of a prosecution if the termination is for reasons not amounting to an acquittal, and it takes place after the jury was impaneled and sworn or, in a trial before a court without a jury, after the first witness was sworn but before findings were rendered by the trier of facts. Termination under any of the following circumstances is not improper:
>
> * * * *
>
> (1) The defendant consents to the termination or waives, by motion to dismiss or otherwise, his right to object to the termination.
>
> * * * *
>
> (3) The trial court finds that the termination is required by a sufficient legal reason and a manifest or absolute or overriding necessity.

It must be emphasized that as soon as the jury has been sworn in a criminal trial the trial judge and the prosecution must be alert that a mistrial could bar retrial under double jeopardy principles. Here, jeopardy having attached, we must

consider whether a retrial is nevertheless permitted either because defendant consented or waived his right to object to the mistrial, or because the mistrial was "required by sufficient legal reason and a manifest or absolute or overriding necessity."

The State's primary argument is that by not having voiced an objection when the assistant prosecutor moved for a mistrial after lunch, defendant's attorney waived his right to object to the termination of the trial. *N.J.S.A.* 2C:1-9d(1). We disagree. The State moved twice for a mistrial, once before lunch and again after lunch. Defendant's attorney successfully argued against the motion before lunch and had no reason to believe that additional argument was necessary when the assistant prosecutor repeated the motion after lunch. Without being given any warning that the judge had second thoughts about his earlier ruling, defendant's attorney could not have anticipated that the judge would reverse himself. There is nothing in this record to suggest that defendant's attorney had withdrawn his opposition to a mistrial. His waiver of the opportunity to express his opposition again certainly was not a waiver of the opposition he had previously expressed.

The jury was aware of only the first three events that the judge referred to when he granted the State's motion for a mistrial. The judge nevertheless included the fourth event as one of the events that contributed to the irreparable prejudice of the jury. After alluding to all four events, he concluded, " . . . [I]t may be that individually there may not be a basis for granting the motion, but combined I think that the jury might have preconceived ideas or notions." At that point the jurors could not have formed "preconceived ideas or notions" from the fourth event because it occurred outside their presence.

The first event was the judge's aside to the jury that "you will be satisfied as to the explanation for the delay" in bringing the matter to trial. The State contends that the remark unfairly inclined the jury to acquit unless the State fully explained the reasons for the delay. However, after the assistant prosecutor had objected at sidebar, the judge not only immediately instructed the jurors that he did not mean that "someone was responsible and has to prove or disprove what they have done or have not done to bring the case to trial," but also obtained an assurance from the jurors that, unless "it will be evidential if it comes out at trial," the delay would not "influence" them in deciding the issues of the case. The assistant prosecutor expressly thanked the judge when asked if the supplemental instruction "covers it."

The second event was the judge's preliminary instruction to the jury that they have led them to believe that testimony could not be read back to them during their deliberations on a verdict. The State contends in its brief simply that the judge's remark "compromised the integrity of the trial as a search for the truth." When the assistant prosecutor called the matter to the judge's attention out of the presence of the jury, the judge assured him that he would correct any mistaken impression that the jury may have had on the point when he delivered his final charge. The assistant prosecutor, who had not asked for any relief, thanked the judge. We fail to see how this event "compromised the integrity of the trial."

The third event was the reference in defendant's attorney's opening statement to the fact that there had been prior proceedings in the case when defendant was a juvenile. The State simply contends in its brief that "it is improper for the defense attorney to refer to prior proceedings in an attempt to evoke sympathy of the jury for the defendant, on the theory that the defendant is being persecuted." The assistant prosecutor acknowledged at trial that the State's key evidence is Sam's testimony. It is unrealistic to believe that defendant's

attorney would not attack Sam's credibility with the contradictory and nonsensical testimony he gave in the Juvenile and Domestic Relations Court 13 years earlier when he was 5 years old. Even if defendant's attorney had not mentioned the prior proceedings in his opening statement, the jury inevitably would learn of them in the course of the trial.

None of these three events could possibly have contributed to a need to terminate the trial — a need that has long been measured by the need to protect "the ends of public justice." *United States* v. *Perez*, 22 *U.S.* 579, 6 *L.Ed.* 165 (1824).

The fourth event was essentially an evidence ruling by the trial judge with which the State disagreed. The immediate issue before the judge was whether defendant's attorney may tell the jury in his opening statement that 13 years earlier a Juvenile and Domestic Relations Court judge had found that Sam was then incompetent to testify. The answer to that question depended upon the admissibility of that 1976 judicial determination.[3]

Where the State moves for a mistrial in a criminal case because it believes an evidence ruling is in error, the judge

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[3] The attorneys did not present their arguments on this evidence question within the framework of the Rules of Evidence. Had they done so, the State's argument would probably have been that the prior determination was merely that judge's inadmissible hearsay opinion that Sam could not testify because, given the mental limitations of his age, he was "incapable of understanding the duty of a witness to tell the truth." *Evid.R.* 17(b). That determination is irrelevant because now, thirteen years later, Sam no longer has those limitations. Defendant's argument would probably have been that the prior judicial determination was a finding of fact, binding in all later proceedings of the same prosecution, that Sam could not testify that defendant was his mother's killer because, given the mental limitations of his age, his ability to perceive what he may have seen was faulty so he did not have "personal knowledge of the matter," a prerequisite to the admissibility of a witness's testimony. *Evid.R.* 19. We need not extend the arguments or decide the issue.

should either deny the motion or change the evidence ruling if, upon further reflection, he agrees that it was erroneous. Here the trial judge did not change his ruling.[4] The assistant prosecutor, if he disagreed, should have accepted the judge's offer to say the trial so that he could make an emergent motion in this court for leave to appeal. *R.* 2:3-1(b)(5). Instead, the State unaccountably chose to move for a mistrial. Such easy and inappropriate recourse to a motion for a mistrial suggests that the State wanted to start over because its case had "turned sour" or, for some undisclosed inexcusable reason it was not able to proceed. Retrying a criminal defendant in those circumstances strikes directly at the core of his constitutional right to be free of a second prosecution for the same offense. *See State* v. *Stani*, 197 *N.J.Super.* 146, 151 (App. Div. 1984).

The order denying defendant's motion to dismiss the indictment is reversed.

I hereby certify that the foregoing is a true copy of the original on file in my office.

Acting Clerk

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[4] Although after he granted the motion for a mistrial on Friday the judge immediately restated his belief that his evidence ruling had been correct, he obviously was uncertain because he added that he would be willing to reconsider the ruling the following Monday. In any event he could not simultaneously have believed that the ruling was correct and that there was a "manifest necessity" to grant a mistrial because the ruling was wrong. In view of his doubts, the judge should have continued the trial from mid-afternoon Friday until the following Monday morning to give the matter further consideration.

APPENDIX C

— EXCERPT FROM TRIAL TRANSCRIPT —
N.J. SUPERIOR COURT, LAW DIVISION,
HONORABLE ERNEST L. ALVINO PRESIDING

NOVEMBER 4, 1988

STATE V. LEROY HOWARD
Ind. I-0775-10-84

MR. MENNITE: Your Honor, at this time I would move for a mistrial.

THE COURT: For what reason?

MR. MENNITE: Because the Court is ignoring the fact that the time has passed that a finding about a witness when he's five years old has nothing to do with a case that is being brought in the present day, and the Court is allowing the jury to become prejudiced against the State's case on the basis of findings that were made with respect to a witness' condition 13 years ago.

THE COURT: Would this event not go to the lack of evidence or the passage of time? Would it not go to the credibility —

MR. MENNITE: Your Honor —

THE COURT: — of the testimony?

MR. MENNITE: The point is, the passage of time is supposed to be irrelevant, except as it relates to counsel's ability to attack the credibility of the witnesses.

As far as legal proceedings are concerned, the passage of time is supposed to be irrelevant. We can't talk about that any more than they can.

THE COURT: All right. Isn't the memory of a witness one of the factors in terms of determining credibility? The age of the witness, the ability of the witness to recall the facts, and

to relate them to the jury or to relate them as they occurred? Isn't this finding by the Court —

MR. FAULK: Can I add one more fact? And the ability to understand right from wrong.

THE COURT: I think it's admissible, and I will deny the motion for a mistrial.

MR. MENNITE: Okay. Your honor, over the lunch hour I'm going to be making a decision as to whether to appeal this or not, but I'll inform the Court and request a stay at the time, if necessary.

THE COURT: All right, you don't object to the continuation, but you are going to appeal?

MR. MENNITE: I do object to the continuation. I certainly do.

THE COURT: All right. Okay. I thought you said over the lunch hour. Okay, we will try and make the opening at this time. We will recess at this time. You want to determine if you are going to take an interlocutory?

MR. MENNITE: Yes.

THE COURT: Okay, fine.

(Whereupon, the side bar discussion concluded, and the proceedings were placed back on the record in the presence and hearing of the jury.)

THE COURT: We are going to adjourn at this time for your lunch, okay? Take an hour for lunch. Return at quarter of two, and then we will meet at that time and I will — all right, we will meet at that time.

What has occurred to this point should not influence you that I'm recessing in the middle of an opening statement. We have a legal situation which is not for the jury. Facts are for you. Legal situations are for the Court, and I deem it appropriate at this time that we should recess.

Don't discuss anything at lunch, except maybe the quality of the food, but other than that, refer not to the case or anything that has occurred thus far, okay?

All right, I'll excuse you for lunch, and return in about an hour, quarter of two, and then I will be with you then. Thank you. Watch your step.

(Whereupon, the jury is excused for the lunch recess at 1:40 p.m.)

THE COURT: We will recess, and in the meantime, Prosecutor, before we bring in the jury after lunch, let us know the status.

MR. MENNITE: Thank you very much, your Honor.

THE COURT: Thank you. We will adjourn.

(Whereupon, a luncheon recess was taken at this time.)

(Whereupon, Court resumed at 2:00 p.m.)

THE COURT: Prosecutor, anything further?

MR. MENNITE: Yes, Your Honor, if it please the Court, at this time I would renew my motion for a mistrial, and I would argue these grounds.

First of all, when the Court addressed the jury panel that was brought in the Court today, the new jury panel for today, the Court mentioned that there had been a 13 year delay, which it was agreed would be mentioned, and the Court stated to the jury you are going to receive an explanation for that delay, and I'm sure you will be satisfied with the explanation.

I would submit that that has put us in an impossible position, because we really wouldn't be permitted to go into all the reasons for the delay.

I haven't prepared to call any or all of the witnesses that might be necessary to explain a delay, because the delay is irrelevant.

The jury has to decide did this defendant commit this crime on the basis that they are hearing today? So, that is one problem.

The second argument is that the Court — I guess shortly after the swearing of the entire jury panel stated to the jury that if they were to — stated to the jury that their function was to determine the facts, and if they were to have questions about the facts, about the testimony of any particular witness, the Court would simply instruct them you have to rely on your own recollection. I can't tell you what any of the witnesses said, and as we had discussed already on the record, there are cases that permit the Court to read back the testimony, and I would submit the jury was thereby discouraged from seeking clarification on possibly important points, because they have already been pre-conditioned to think that they can't ask that particular type of question.

The third problem is that during opening statements, his opening statement, defense attorney stated that the defendant, because he was 16 years old at the time, was originally charged as a juvenile which gets the jury into the question of what legal proceedings have been undertaken in this case, which I would submit is totally beyond the province.

And finally, counsel began to tell the jury that — or did tell the jury that there was a hearing previously held in this matter in juvenile court. I believe he mentioned the year. I'm not entirely certain. The year would have been 1976, but in any event, counsel started to tell them that there was a juvenile hearing held in this matter, and at that time I asked for a side bar. I asked for an offer of proof.

Counsel stated that he wished to bring out the fact that at that hearing or as a result of that hearing, Judge Klaisz found

the defendant — I'm sorry, found Samuel Wilson incompetent to testify, and for the record, he was found incompetent to testify principally because he was five years old at the time, and the Court ruled that on the basis of his testimony in Court, he was not able to understand the duty to tell the truth, and was not able to understand the oath to tell the truth.

Mr. Faulk argued at side bar that that testimony was relevant both to any evidence — or was relevant to an attack on any evidence of the in-court identification that was offered by the defendant or by the victim at the time of that hearing, and also was relevant to the out-of-court identification that was offered spontaneously by the victim or by Samuel Wilson at the scene over the phone and so forth.

My understanding is that the Court ruled that it could go in for — could go into evidence, that this finding of incompetency could go into evidence for the purpose of attacking both the testimony of the in-court identification, and the testimony of the out-of-court identification.

At that time I moved for a mistrial and asked for a recess, which the Court granted.

So, I would renew my motion for a mistrial on those grounds.

THE COURT: What is the second ground, Prosecutor?

MR. MENNITE: The second one was that the Court told the jury that if they were to have a question about the contents of someone's testimony, that the Court would just tell them they had to rely on their own recollection of it. Thus, putting into their minds the idea that they could not ask a question for clarification on that particular type of point.

THE COURT: All right. Thank you. Mr. Faulk, any response?

MR. FAULK: Nothing, Your Honor, no.

THE COURT: All right, there were several bases for the request for mistrial, and it may be, it may be that — I think there were five grounds alleged for a mistrial, centering mainly about the juvenile hearing and the testimony or non-testimony of the juvenile, the delay in the proceeding, the findings by the juvenile court, the instruction concerning the jury questions certainly can be corrected, and it may be that individually there may not be a basis for granting the motion, but combined I think that the jury might have preconceived ideas or notions. I will grant the motion, but I'm going to ask that this matter resume tomorrow for the selection of the new jury. I'll grant the motion. Saturday, I'm sorry, yes.

MR. FAULK: I move to dismiss the indictment on the basis of double jeopardy.

THE COURT: All right.

MR. MENNITE: Your Honor, I would oppose that motion. I would urge that among other things, the defense team's own action has been responsible for part of the problem here, and for that reason I would submit that it shouldn't be granted.

MR. FAULK: I submit otherwise, Your Honor. The Court at the side bar conference ruled that statements that I was about to make to the jury were perfectly proper.

THE COURT: All right.

MR. FAULK: And consequently, there has been no misconduct on the part of the defense, and it's the Prosecutor's motion for a mistrial. Jeopardy has attached by virtue of the swearing of the jury, and this Court has now dismissed that jury and, therefore, the indictment must be dismissed on the basis of constitutional right against double jeopardy.

THE COURT: All right, I apparently by my ruling I reversed myself, reversed my ruling. I have done some research over the noon hour, and that was the basis for the granting the motion for a mistrial.

The motion to dismiss on the grounds of double jeopardy, opposed by the Prosecutor, I will deny at this time. Of course, counsel may take an appeal from that certainly, but the reason and the basis for that is, though the jury has been sworn, there has been no testimony adduced, placing either the State or the defendant in a position of — the defense in the position of offering testimony in this matter.

The jury has been sworn, but that in and of itself is not the total and sole criteria, but I will postpone the scheduling this case from tomorrow to a date — if you wish to appeal the denial of your motion for dismissal of the indictment, Mr. Faulk.

MR. FAULK: You Honor, maybe I need some clarification. Has the Court reversed itself with regard to my statements in opening?

THE COURT: As to the reference — I think there was reference made that an order was issued or at least there was a juvenile proceeding.

Also, my explanation to the jury that I'm certain they would be satisfied by the explanation or they would be satisfied as to the length of time that has passed.

It may have, and it appears to have put the burden upon the Prosecutor to explain it, and they are under no compulsion to explain it.

The question or the explanation which I gave to them that their questions would be answered summarily by referring solely to their recollection is a factor, but it's not that important a factor.

The openings by defense counsel and the statements that the juvenile proceedings were held —

MR. FAULK: If I might, Your Honor?

THE COURT: Go ahead.

MR. FAULK: It is going to come out in this trial that juvenile proceedings were held. There was testimony at juvenile proceedings. Not just by Sammy Wilson, and it wasn't testimony. It was statements, because he was not under oath, because it was an attempt to qualify him for the oath which was unsuccessful, but there was testimony by others, and there will be reference and cross-examination by me to previous testimony during the juvenile proceeding.

I don't see where this jury's knowledge that this matter originally surfaced in the juvenile court is in any way prejudicial to either the State or the defense. There have been prior hearings. There was a Rule 8 hearing. There have been prior hearings. In most criminal cases there is some sort of prior hearing, be it grand jury, be it Rule 8 hearing, be it a preliminary hearing or whatever.

So, what difference does it make whether I referred to it as a juvenile court proceeding or any proceeding? I don't think there is any misconduct on the part of the defense, Your Honor. That's the position I'm taking.

THE COURT: I'm not alleging — I'm not stating misconduct on the defense. I think it may have been the Court having permitted something which it should not have, and I'm not saying there is any misconduct by the defense. Absolutely not.

Any response, Prosecutor?

MR. MENNITE: For the record, obviously counsel can cross-examine someone on the basis of testimony at a prior hearing. However, it's not necessary to refer to what kind of hearing that was. It's not even necessary to refer to the date of that hearing, unless there is some confusion about that.

THE COURT: It may have to be some parameters set out as to that juvenile proceeding. There may have to be, if the matter goes to trial, because I don't think there can be a blanket license to go into the juvenile proceedings. I think

there must be some limitations. There would have to be, and I would have — and that would have to be determined by the Court, but yes, I did reverse myself, but based upon the accumulation. Not upon one factor, Mr. Faulk.

I've granted the motion for a mistrial. I denied your motion for dismissal based on double jeopardy.

I would proceed to draw a jury tomorrow, but if you wish to take an appeal on the matter, certainly, I would grant leave for that.

MR. FAULK: Your Honor, I don't know until I go back to the law books.

THE COURT: Okay.

MR. FAULK: To be honest with you.

All right, gentlemen, we will reconvene this matter for trial purposes at 10 o'clock. By that time you will know your course of action.

MR. FAULK: I assume we are going to bring the jury back and tell them and give them the good news?

THE COURT: Would you bring in the jury, Mrs. Brummer?

MR. MENNITE: Thank you, Your Honor.

THE COURT: All right, thank you, gentlemen. I won't explain to them, except legal issues have occurred.

MR. FAULK: Requires determining.

THE COURT: Right, and I hope —

(Whereupon, the jury enters the courtroom at 2:35 p.m., and were placed in their respective seats in the jury box.)

THE COURT: Good afternoon. The matter ended abruptly before lunch, and I must excuse you. We will discontinue this case for a moment with this jury. Not because of

you. Because of some legal matters which occurred, and will not permit the case to continue to trial at this time, okay?

There are legal issues. It's nothing to do with the composition of the jury or anything of that nature. You were selected, and both attorneys were satisfied with their selection, but as a matter of certain issues that have been raised, legal issues, I must excuse the jury, and thank you for the time you have been with us. Thank you for your service, and you are excused here. Hope to see you again. Maybe we will, okay? Thank you very much.

Juror number four is not well, and I knew it when that seat was empty. So, Mrs. Brummer is taking care of her. Thank you very much.

(Whereupon, the jury is excused from this case at 2:35 p.m.)

THE COURT: Gentlemen, thank you very much.

MR. MENNITE: Your Honor, if I might, the Court has recessed the matter at least until Monday, and the Court has also frankly indicated that it is inclined —

THE COURT: An inclination.

MR. MENNITE: An inclination. As a practical matter, if the Court should rule in the favor of the defense on that, I would be seeking leave to take an interlocutory appeal.

I guess what I'm trying to find out is whether I should request an order now or whether I should — I think Your Honor said you were going to discuss it Monday and give us a final ruling Monday?

THE COURT: Yes. Okay, by that time you may want to do a little more looking in the file a little more and so forth.

MR. MENNITE: Thank you.

THE COURT: Gentlemen, thank you very much. So, we will adjourn until Monday.

(Whereupon, the proceedings in this matter concluded at this time.)

* * * *

APPENDIX D

— EXCERPT FROM TRIAL TRANSCRIPT —
N.J. SUPERIOR COURT, LAW DIVISION,
HONORABLE ERNEST L. ALVINO PRESIDING,
NOVEMBER 7, 1988
STATE v. LEROY HOWARD
Ind. I-0775-10-84

THE COURT: All right.

The cases mentioned by the defense, the federal cases and New Jersey cases, mention manifest necessity of the circumstances which surround the ruling by the Court that was to continue or to adjourn the case by the grant of this trial, was there manifest necessity for that, was there manifest necessity for the denial of the motion for a dismissal of the indictment. But primarily directed towards the motion for a mistrial. Manifest necessity.

And the mistrial motion was made at the point after the jurors were selected and sworn, and when defense counsel was into his opening statement, the prosecutor having delivered his opening statement. At a point in the defense counsel's statement, where it was mentioned by counsel, defense counsel, that — these are not the exact words, but that the defendant appeared in or there was a juvenile proceeding, defendant being 16 years of age at that time, appeared in Juvenile Court, either a few other words were said or at that point, the prosecutor objected, asked for a sidebar, which was granted.

At the sidebar conference, there was an objection made by counsel, by the prosecutor, that the mention of the juvenile proceedings was inappropriate, and there should be no mention to the jury, there should be no testimony or evidence submitted to the jury concerning the juvenile proceedings.

At the sidebar, there was further discussion of the admissibility or the proffer by the defense, the defendant indicated that the order of the — the order of incompetency as to the witness in the case, the five-year old witness, that the order declaring that witness incompetent at that time, was admissible as the law of the case, and counsel urged that everything concerning the juvenile proceedings, specifically the order of the Court declaring the witness an incompetent witness, was admissible and would be urged for admission and mention during the defense — during defense counsel's opening statement.

I was inclined to agree. The fact of the matter is, I said at that time, I agree, I will permit it, apparently I agreed that it was the appropriate ruling to be made, that there was a juvenile hearing, that this defendant and the juvenile witness were part of that proceeding, that it was the law of the case, and I would permit it to be mentioned and brought to the attention of the jury, again, in opening statement and/or in testimony or evidence.

At that point, the prosecutor either moved for a mistrial or asked for a recess in order to further research the matter.

And upon recess, as I recall, it may have been partly — part of this was presented at the sidebar, or after a recess, and counsel and Court convened out of the presence of the jury.

I recall that the prosecutor raised several points for a mistrial; one was that the remarks by the Court to the panel that the 13-year delay would be explained to the satisfaction of the jury, would be explained by the State, and that they would be satisfied by that explanation, the basis was that this placed an unproper and undue influence upon the State that they were not compelled to bear. They may explain it, but are not compelled to explain it. And if it was explained or unexplained, the jury may consider it however it wishes.

The second point raised by the prosecutor for mistrial was that I instructed the sworn jurors that at the end of the

case in their deliberations, they would hear all the testimony during the trial, they will hear and sell all the evidence, they will hear all the testimony, and if at the end of the case in their deliberations, they have a question as to the testimony of any witness, they can't ask the Court a question in effect which says, We would like to know what the testimony of witness "X" is, or did witness "X" say this, or something else, and I replied, not verbatim, but I replied and told them I would have to answer them, I will have to send back a written answer without even convening them, that they must rely upon their own recollection of the facts, and they must rely upon that rather than have someone else tell them what the testimony was, because they are the judges of the facts.

I gave no instruction at that time, no curative instruction, but I did assure counsel that, at the end of the case, my standard instruction included that, and I was satisfied that it would be satisfactorily explained.

I — as to the first point raised by the prosecutor, I did mention to the jury and gave them what I thought was an instruction which would — which had a curative effect.

The third question raised by the prosecutor was the statement by defense counsel in his opening, it referred to the juvenile proceedings, before the prosecutor could object and before a sidebar was held, indicating that the defendant appeared at a juvenile proceeding and stated that he was 16 years of age at the time. And the prosecutor went into detail.

The fourth question raised by the prosecutor is what we discussed here; defense counsel urged that — at sidebar, that he be permitted to continue with his remarks of the juvenile proceeding, and furthermore, make reference to an order of competency rendered by the Court, Juvenile Court, at that time, concerning — the incompetency, rather, of the juvenile witness for whatever reason, and the Court informed counsel, both prosecutor and defense counsel, that it would permit

these remarks and would permit the order; it should be introduced and admitted in the trial as the law of the case.

It was at that point that Mr. Mennite moved for a recess in order to make a motion for a mistrial, or, he did.

And as I recall, the prosecutor also stated that all the reasons and the accumulation of all the reasons set forth by him couldn't be cured, it couldn't neutralize or — an instruction couldn't neutralize the remarks, the adverse effect of those remarks, and it would be highly prejudicial to the State to continue. Any curative instructions would be insufficient.

I heard the motion for mistrial and I granted it for the reasons set forth by the prosecutor. The admissibility, the relevancy of the juvenile hearings, of course, cause me some concern and I did later say to counsel that I have an inclination to admit, I did say at sidebar, that I have an inclination to admit almost everything concerning the juvenile proceedings, and it was at that point that the prosecutor mentioned that if that is the case, he would like to decide, he would like an opportunity to appeal that ruling of the Court; but the ruling had not then been made. And, of course, there was no appeal from a ruling that was not made.

During the weekend, of course, — strike that.

After consideration of those factors, motion for mistrial was made and I granted the motion for the reasons that I felt an accumulation of all of these factors, whether I did or intended to give curative instructions to the jury would have such an impact upon the jury that they will have a preconceived — in my opinion, they had a preconceived notion, preconceived idea from the statements made that it would be impossible for the State, for the defendant, to receive a fair trial. From a totality of all considerations mentioned, set forth there, I felt that a motion for a mistrial was appropriate and should be granted.

The manifest necessity of that motion was as set forth; an accumulation of all these reasons would appear that a mistrial must be granted despite any instruction which would be given to the jury. A notion, I'm sure, a preconceived notion, would have been implanted in the minds of the jurors whereby a fair trial to either the State or the defendant would not be possible.

Counsel for the defense, upon my grant of the motion for mistrial, then made a motion to dismiss the indictment on the grounds of double jeopardy. I denied the motion and we are here today for a reconsideration or renewal of that motion by defense counsel.

I examined what I have ruled on the motion for a mistrial and I felt that there was a manifest necessity that that motion be granted. I denied the motion for dismissal of the indictment, based on the grounds of double jeopardy, what prejudice has been done to the defendant, but, first, I did tell counsel that I have an inclination to admit everything concerning the juvenile proceedings, and upon that basis, I would have permitted defense counsel to mention to the jury the proceedings in Juvenile Court and the order of incompetency rendered by the Juvenile Judge, at that time, as to the witness, the five-year old witness.

I have considered my remarks at sidebar which precipitated and compelled — it appears which precipitated the prosecutor in making his motion for mistrial. A portion of that evidence or testimony, in my judgment, which might be subject to a Rule 8 hearing, 8(3) hearing, would be that the credibility of the juvenile would certainly be a subject for the defense to attack.

The order of the Court, which I previously represented to counsel, both counsel, would be admitted in evidence, I would permit defense counsel to comment upon it, as the law of the case, in my judgment, should not be, of course — of course, there may be a Rule 8 hearing, but would not be

because that order is merely an accumulation or a result of what occurred between the Judge and the juvenile at the hearing. It would serve no purpose except to conclude — except to inform the jury that the Judge concluded a fact which is for the jury to determine. He was sitting as the judge in that case, but it would be for this jury to determine the credibility of the juvenile witness, at that time, as compared to his testimony before the Grand Jury, many years later, as compared to his testimony from the witness stand at this trial. And to permit the order of that Court, the Juvenile Court, to stand and be admitted into evidence, and evidential before the jury, would, in my judgment, be an improper admission of an item or a factor for this jury.

I would have, or it would be that the order of the Juvenile Court would represent the finding of fact at this hearing, this trial, which is for this jury to determine. Credibility of the juvenile witness certainly is subject to attack, whether through inconsistent statements, prior inconsistent statements, or otherwise, would be for the parties, the attorneys, to determine.

But I would rule at this time, though I made a representation to counsel which precipitated, as the prosecutor indicated, the motion for mistrial, I would rule that the order of the Juvenile Judge declaring the juvenile witness incompetent would be improper and I would not admit it under the circumstances here. It would be for the Appellate Court to make that determination.

And I feel it is a manifest necessity, also, in this case because there was a misdirection to counsel; that the motion for a dismissal of the indictment must be denied, and I will affirm my previous ruling.

So the motion is denied, gentlemen.

Any comment of counsel?

MR. FAULK: Your Honor, I don't wish to reargue the motion; the Court has ruled. But first of all, the case law is clear that where the constitutional protection of double jeopardy has been infringed, there is no need of any showing of prejudice on the part of the defendant.

THE COURT: Where is the cutoff point?

MR. FAULK: The cutoff point is when it is the dismissal of the jury. The prejudice is in the discharge of the originally chosen jury.

THE COURT: Where would the cutoff point be; where does prejudice arrive in this case?

MR. FAULK: Prejudice is not at issue in this case. The discharge of the jury, once jeopardy has attached, is the violation of the right of double jeopardy.

THE COURT: Where does double jeopardy arise in this case; at what point?

MR. FAULK: Double jeopardy arises at the point the jury is empaneled and sworn, which did occur.

THE COURT: Is that an absolute?

MR. FAULK: That is an absolute. It is in both 2C:1-9(d) and by a litany of Supreme Court cases. Double jeopardy had attached on Friday, at the time that the Court attendants distributed the Bibles to the 16 respective jurors and had them take the oath. That's when double jeopardy attaches. It attaches in every jury trial at that stage by constitutional rule and the Supreme Court has created a bright line rule so there is no doubt, in a jury trial, it occurs at the time the jury is empaneled and sworn. In a non-jury trial, it occurs at the moment that the first witness takes the oath. So we have a bright line rule, number one, so jeopardy had attached.

Secondly, there is no need for the defendant to show any prejudice by virtue of the fact that he is being tried a second time. The prejudice is in the violation of his constitutional

right to be free from multiple trials. In and of itself, no further prejudice need be shown.

Illinois versus Somerville, which is cited in our brief, makes that clear, as does New Jersey Law Division decision, State versus Nappo, N-A-P-P-O, 185, Super. 600, at page 607.

THE COURT: Prosecutor?

MR. MENNITE: Your Honor, I would — as far as having a bright line rule, I would concede that the general rule is that double jeopardy attaches when the jury is sworn. However, there are cases that hold that that is not a hard and fast rule.

I would submit to the Court that the State is being put in a position, if Mr. Faulk's motion were to be granted, the State is put in a position where certain things were done by the Court, with all due respect, which the Court has acknowledged probably should have been done differently. The defense tried to admit some evidence and tried to mention it — tried to mention it, rather, in openings, evidence at least some of which the Court has now decided was not proper, and we were put in the position where the jury is going to be contaminated once and for all, if this got to them.

The State has a right to a fair trial, as well, and I would submit that under those circumstances, that the — there was no misconduct on the part of the State, and the State should not be barred from conducting a retrial.

Also, I would ask the Court with regard to the juvenile proceedings, I would ask for a clarification of the rulings. As I understand it, the Court is not going to allow the order itself, judging Samuel Wilson incompetent, to be admitted into evidence. I'm not clear on whether the Court — I would assume the Court is not going to allow testimony that he was declared incompetent.

THE COURT: No. The Court will not permit the order of the Juvenile Judge in evidence. The Court will not permit

the basis for that ruling, the findings by the Judge. But it will permit any dialog, any testimony, by the juvenile.

MR. MENNITE: Right. I don't object to that. I think that is proper.

THE COURT: All right.

MR. FAULK: Your Honor, I object to that. And that's — that has come out of left field. I haven't had an opportunity to present any argument in that regard.

This Court's preliminary ruling on Friday was otherwise. Secondly, the Court seems to indicate that that — or that determination by the trial judge was a question of fact; in fact, it wasn't. It's a question of law that must be ruled on by the trial Court.

Competency of every witness is an issue of law that is determined by the Court itself, and the Court made such determination based upon the opportunity to observe and hear the witness at age five, and I submit that this jury has a right to know what the observations and rulings of the Court were, at age five, 13 years ago, when that witness appeared before the Juvenile Court Judge.

What we are doing is, we are misleading this jury by waiting 13 years and bringing an 18-year old in here to now testify and without giving this jury the benefit of a ruling of law, which was based upon the observations of a Court, at that time, which is the law of the case, and which was not appealed by the prosecutor. The prosecutor had the opportunity to appeal that ruling 13 years ago, and eschewed that opportunity.

So I submit what we are doing is we are prejudicing the defendant throughout this proceeding, first of all, by the 13-year delay on the part of the prosecution, now bringing the case before a jury 13 years later, and then by, as soon as the ruling goes bad on the part of the prosecution, now they want to get rid of that jury and bring in another jury because it's not

going right. We're going to get this guy any way we can. That appears to be the position of the prosecution. Wait 13 years and then, when we don't get a ruling we like, move for a mistrial, get ourselves a new jury, we'll hang him one way or another.

And I submit that the prejudice is overwhelming in this instance to the defendant. He had a right to have that jury hear his case and that jury was discharged because of the wrongful motion of the prosecution in this case.

THE COURT: All right. Thank you.

MR. FAULK: And, your Honor, I would further ask for a stay, so that I may appeal the rulings of the Court.

THE COURT: All right. Are you going to proceed with the stay immediately?

MR. FAULK: I would like a stay, your Honor. I believe in order to effectively appeal this, I have to have a transcript of what occurred on Friday and this morning's hearing, and I spoke with Karen Wessner on Friday, and if I make the request today, she indicated to me she should get it to me by the end of the week, and, hopefully, our court reporter this morning, if we don't carry on too much longer, can get it to us in the same period of time. But I think an Appellate Court absolutely has to have the full flavor of what occurred because all of us are relying on our memories of what occurred Friday and some things become significant after the facts so our memories of them may not be as good as the transcript itself.

So I would ask for a stay, so that I can appeal this matter to the Appellate Division after I receive a transcript. I believe this would be an interlocutory order which would give me 15 days to appeal. If we can get it by the end of the week, I can probably have the appeal filed by next Monday.

THE COURT: Prosecutor, any comment?

MR. MENNITE: It's going to cause more delay to wait for the transcript. I think we can rely on affidavits in lieu of transcript. That's my only comment.

MR. FAULK: Your Honor, in response to that, I would simply say, it was the prosecutor who moved for the mistrial, who sought delay by discharging the jury we had already selected, and I think the defendant ought to have the opportunity to have a full record on appeal, so that this matter can be decided by the Appellate Court without simply our recollections as to what the record was. And I'm sure this Court would like the Appellate Court to have the opportunity of its findings this morning, which were placed on record, and I know under the Rules of Court, this Court has that opportunity to do that.

THE COURT: All right, I will grant the motion for a stay. I am sure you will do it as expeditiously as possible.

MR. FAULK: I certainly will.

THE COURT: All right. Thank you, gentlemen. Stay will be granted pending appeal.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM [illegible]

STATE OF NEW JERSEY,

Petitioner,

vs.

LEROY HOWARD,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION
TO THE PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF NEW JERSEY

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BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Does the decision of the court below barring Respondent's retrial on the basis of the standards set forth in N.J.S.A. 2C:1-9d constitute adequate and independent state statutory grounds which preclude this Court from granting the Writ sought by Petitioner?

2. Do federal double jeopardy principles bar the retrial of Respondent where there was no necessity at all for the declaration of a mistrial and where the mistrial was sought by the State in order to buttress its evidence and obtain a more favorable opportunity to convict?

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CONSTITUTIONAL PROVISIONS:

United States Constitution, Amendment V. 8
United States Constitution, Amendment XIV. 9
New Jersey Constitution (1947), Article I, para. 11. 8

UNITED STATES STATUTES:

28 *U.S.C.* sec. 1257. 1

NEW JERSEY STATUTES:

N.J.S.A. 2C:1-9. . . . . passim
N.J.S.A. 2C:1-10 8
N.J.S.A. 2C:1-11 8
N.J.S.A. 2C:1-12 8

RULES OF THE SUPREME COURT OF THE UNITED STATES:

Rule 10. 19

NEW JERSEY COURT RULES:

Rule 2:12-4 24

OTHER AUTHORITIES:

Model Penal Code, 10 *Uniform Laws Annotated*, sec. 1.08 (1974). 9

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

As set forth in Point I infra, Respondent disagrees with Petitioner's contention that this case involves the Double Jeopardy Clause of Amendment V or Amendment XIV, Section 1 to the United States Constitution. Rather, it is the position of Respondent that the decision below involves only the provisions of *N.J.S.A.* 2C:1-9 set forth below.

2C:1-9. **WHEN PROSECUTION BARRED BY FORMER PROSECUTION FOR THE SAME OFFENSE**

> A prosecution of a defendant for a violation of the same provision of the statutes based upon the same facts as a former prosecution is barred by such former prosecution under the following circumstances:
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> * * *
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> d. The former prosecution was improperly terminated. Except as provided in this subsection, there is improper termination of a prosecution if the termination is for reasons not amounting to an acquittal, and it takes place after the jury was impaneled and sworn....Termination under any of the following circumstances is not improper:
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> > (1) The defendant consents to the termination or waives, by motion to dismiss or otherwise, his right to object to the termination.
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> > * * *
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> > (3) The trial court finds that the termination is required by a sufficient legal reason and a manifest or absolute or overriding necessity.

STATEMENT OF THE CASE

On December 30, 1975 Wilma Wilson was shot and killed in he home. *Pet. App. B* at 2b. Present in the house at the time was her son, Samuel, age 5. *Id.* Respondent, then 16 years of age, was arrested and charged as a juvenile with the murder based upo an alleged identification by five-year old Samuel. *Id.*

Two weeks later, on the motion of the State, a hearing was held in Juvenile and Domestic Relations Court to determine if Respondent should be held for indictment and tried as an adult. Id. At this hearing the State attempted to present identification testimony by Samuel. A challenge was made to Samuel's competency to testify and, after Samuel allegedly identified Respondent, the juvenile court ruled that Samuel lacked the requisite capacity to be a witness. *Id.* at 3b. Specifically, the court found:

> ...I cannot be sure to a moral certainty that the boy does not know either the importance of what he is saying or the importance of giving the right testimony rather than the wrong testimony. I cannot say to any degree of certainty that he is unduly subject to suggestion because I know of no way of measuring this. But the matter under consideration is far too serious for the Court to guess as to firstly, whether he knows what he is saying and secondly, the importance of saying only the truth. My personal information is, he does know what he is saying but I cannot say to a degree of certainty that he knows what will happen to him either in this world or the next if he should willfully or unwittingly tell an untruth. I, therefore, am reluctantly persuaded to the conclusion that this testimony should not be accepted.
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> *Id.*

Based on this finding, the Court entered an Order declaring that Samuel Wilson "is incompetent to be a witness in any hearing, trial or proceeding relating to the death of Wilma Jean Wilson...."

The juvenile court nevertheless referred the matter to the Law Division so that an indictment could be sought against Respondent as an adult. *Id*. Respondent appealed from this referral.

While the appeal was pending, Respondent voluntarily underwent a polygraph examination by the chief polygrapher for the Gloucester County Prosecutor's Office, who concluded that Respondent was "telling the truth as to his denial of participating in or having knowledge of the...crime."

Also while the appeal was pending, the State presented the matter to a grand jury, which declined to indict Respondent. *Id*. Respondent's appeal was therefore dismissed as moot.

Six years later Respondent was rearrested and recharged with the murder of Wilma Jean Wilson. In October of 1984 Respondent, after waiving juvenile court jurisdiction, was indicted for murder and felony-murder and pleaded not guilty to the indictment.

After three years of pretrial proceedings punctuated by numerous motions and one appeal by the State, and almost 13 years after the murder, this case was finally called for trial. *Id*. Jury selection initially took place on October 24, 1988. Sixteen

jurors were chosen (but not sworn) and were instructed to return to hear the evidence on November 4, 1988. On November 4th, three of the chosen jurors were excused for valid reasons and a new jury panel was summoned to fill these vacancies.

During the course of its voir dire of this new panel, in anticipation of questioning the panel regarding whether the 13 year delay would affect any juror's ability to fairly judge the case, the trial court remarked that the jurors would be "satisfied as to the explanation of the delay." *Id.* at 4b. The prosecutor raised a concern about this remark, and the trial court immediately clarified its statement by telling the jury that neither the State nor the defendant was required to justify the delay. *Id.* at 5b. The trial judge directly questioned the jurors as to whether the delay would have any impact whatsoever on their ability "to fairly judge the defendant and the State in this matter." *Id.* No juror responded affirmatively and so the court then asked counsel if "that covers it." *Id.* Both defense counsel and the prosecutor acknowledged that the court's clarification effectively disposed of the matter. *Id.* at 6b.

After the vacancies had been filled and the jury sworn, the trial judge addressed some preliminary instructions to the jury emphasizing the jury's role as judge of the facts and the need to pay close attention to the testimony and evidence. *Id.* In so doing, the court indicated that if during deliberations some jurors had questions regarding some testimony, they would have to rely on their memories. *Id.* The prosecutor expressed some

concern with this remark, contending that it implied that no testimony could be read back. *Id.* at 7b. The trial court replied that any ambiguity created by the remark would be cleared up in the usual instructions at the close of the case, by telling the jury that the court does have discretion to permit some testimony to be reread. *Id.* The prosecutor readily accepted this, thanked the court, and sought no further action by the court. *Id.*

The State then presented its opening statement to the jury, making reference to the fact that Respondent was 16 years old at the time of the murder. Following this, defense counsel commenced his opening. Defense counsel reiterated the prosecutor's reference to Respondent being 16 years of age at the time of the murder and that Respondent's accuser, Samuel Wilson, was then five years old. *Id.* Counsel also made reference to the fact that Respondent had initially been charged as a juvenile and that there was a juvenile court hearing in 1976 shortly after he was charged. *Id.* at 7b-8b.

At this point the prosecutor interrupted counsel's opening and at a sidebar conference asked for an offer of proof as to what counsel was about to say. *Id.* at 8b. Defense counsel informed the court he intended to tell the jury that five-year-old Samuel Wilson had been found incompetent to testify at that hearing. *Id.* The prosecutor acknowledged that the State intended to present testimony regarding Samuel's alleged in-court identification of Respondent during the hearing at which he was

found incompetent. *Id.* at 8b-9b. But the prosecutor nonetheless contended that the incompetency finding was irrelevant and the jury should not be told of it. *Id.* at 9b.

While still at sidebar the trial court ruled that the judicial finding of incompetency was relevant and admissible, and therefore defense counsel could refer to it in his opening. *Id.* Immediately the prosecutor moved for a mistrial. *Id.* After further argument by both the prosecutor and defense counsel, the court denied the State's motion, but granted the State's application for a recess to determine if it wanted to take an immediate appeal from the ruling. *Id.* The trial court also indicated a willingness to grant a stay if the State decided to appeal. *Id.*

When the prosecutor returned from the recess, instead of accepting the court's offer of a stay so an immediate appeal could be taken, he renewed his motion for a mistrial, this time contending that the court's remarks to the jury, along with the evidential ruling and defense counsel's passing reference to the juvenile court hearing, required that the jury be discharged. *Id.*

Despite its prior curative instruction to the jury, and without reversing itself on the evidential ruling it had made before the recess, the court granted the State's motion for a mistrial. *Id.* at 10b. Defense counsel immediately raised the prospect that the mistrial could bar the retrial of Respondent, by moving to dismiss the indictment. *Pet. App. C* at 6c. The

trial court specifically found that there was no "misconduct by the defense....absolutely not", *Id.* at 8c, but nonetheless reaffirmed its decision to grant the State's mistrial motion. *Id.* at 9c. Thereafter the court brought in the jurors and discharged them. *Id.* at 9c - 10c.

An interlocutory appeal was taken from the trial court's denial of Respondent's motion to dismiss the indictment, and a unanimous panel of the New Jersey Superior Court, Appellate Division, ruled that the declaration of the mistrial violated the express provisions of *N.J.S.A.* 2C:1-9d because "there was no necessity at all to declare the mistrial", let alone a "sufficient legal reason and a manifest or absolute or overriding necessity", as required by the statute. *Pet. App. B* at 2b.

The State sought certification of the case from the New Jersey Supreme Court, but on November 1, 1989, the Supreme Court rejected this application. *Pet. App. A*.

SUMMARY OF ARGUMENT

I. The statute governing this Court's jurisdiction, 28 *U.S.C.* sec. 1257, imposes limitations on its authority to review state court decisions. Under the statute, review of a final judgment rendered by the highest court of a state is permitted only where "any title, right, privilege or immunity is... claimed under the Constitution...of the United States." Certiorari review in this case is thus limited to federal constitutional issues.

It is the position of Respondent that the opinion of the court below is clearly based on adequate and independent state statutory grounds, namely *N.J.S.A.* 2C:1-9, the New Jersey statute governing the circumstances under which a subsequent prosecution is barred by a former prosecution. Consequently, there is no federal constitutional issue presented by this case and therefore this Court must deny the State's Petition for a Writ of Certiorari.

II. Even if this Court were to review this case under federal double jeopardy principles, the decision below does not conflict with these principles or with any decisions of this Court or the Courts of Appeals. Consequently, there is no reason for this Court to exercise its discretion in favor of the Petition filed by the State of New Jersey.

ARGUMENT

I. THE DECISION OF THE COURT BELOW IS BASED UPON ITS INTERPRETATION AND APPLICATION OF THE PROVISIONS OF N.J.S.A. 2C:1-9, THEREBY CONSTITUTING ADEQUATE AND INDEPENDENT STATE LAW GROUNDS WHICH PRECLUDE THIS COURT FROM GRANTING THE PETITION.

Although New Jersey citizens are protected against being twice placed in jeopardy by both the Fifth Amendment to the Constitution of the United States, *see Benton v. Maryland*, 395 U.S. 784 (1969), and by Article I, para. 11 of the New Jersey Constitution (1947), *see State v. Farmer*, 48 N.J. 145 (1966), *cert. den.* 386 U.S. 991 (1967), in 1978 the New Jersey Legislature elected to provide its citizens with additional protection by enacting statutory standards governing the circumstances under which a subsequent prosecution is to be barred by a former prosecution. *See N.J.S.A.* 2C:1-9; *N.J.S.A.* 2C:1-10; *N.J.S.A.* 2C:1-11 and *N.J.S.A.* 2C:1-12.

The specific section of the New Jersey Criminal Code at issue in this case is *N.J.S.A.* 2C:1-9, which provides in pertinent part:

> A prosecution of a defendant for a violation of the same provision of the statutes based upon the same facts as a former prosecution is barred by such former prosecution under the following circumstances:
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> * * *
>
> d. The former prosecution was improperly terminated. Except as provided in this

> subsection, there is improper termination of a prosecution if the termination is for reasons not amounting to an acquittal, and it takes place after the jury was impaneled and sworn....Termination under any of the following circumstances is not improper:
>
> > (1) The defendant consents to the termination or waives, by motion to dismiss or otherwise, his right to object to the termination.
> >
> > * * *
> >
> > (3) The trial court finds that the termination is required by a sufficient legal reason and a manifest or absolute or overriding necessity.[1]

As even a cursory review of the opinion below reveals, the New Jersey Appellate Division's decision does not rest on federal constitutional law grounds, but rather is expressly based upon its interpretation and application of state statutory grounds, namely the provisions of *N.J.S.A.* 2C:1-9 set forth above.

At the very outset of its opinion, the Appellate Division framed the issues in the verbatim language of *N.J.S.A.* 2C:1-9 and

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[1]While *N.J.S.A.* 2C:1-9 was derived in part from the Model Penal Code, *see* 10 *Uniform Laws Annotated*, sec. 1.08 (1974), the specific provisions of the statute requiring "a sufficient legal reason and a manifest or absolute or overriding necessity" to terminate a trial comes not from the Model Penal Code but from New Jersey case law applying the common law doctrine of autrefois acquit. *See State v. Locklear*, 16 N.J. 232, 243 (1954). It is thus apparent that the standard of "sufficient legal reason and a manifest or absolute or overriding necessity" was a well-established part of New Jersey common law jurisprudence long before federal double jeopardy principles were applied to the states through the 14th Amendment in *Benton v. Maryland*, 395 U.S. 784 (1969).

cited solely to the governing subsections of this statute in articulating the issues to be decided:

> The issues are whether defendant had consented or waived objection to the mistrial and if not, whether there was 'sufficient legal reason and a manifest or absolute or overriding necessity' for the judge to have declared the mistrial. *N.J.S.A.* 2C:1-9d (1) and (3).
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> *Pet. App. B* at 1b-2b.

Immediately after framing the issues in these express statutory terms, the court below set forth its conclusions, again utilizing the "consent" and "necessity" terminology of the statute:

> We conclude that defendant had not consented to the mistrial, that there was no necessity at all to declare the mistrial, and that the order denying defendant's motion for dismissal of the indictment must therefore be reversed.
>
> *Id.* at 2b. [emphasis added].

After reviewing the factual background of the case and the circumstances which led up to the State's motion for a mistrial, the Appellate Division pointed out that the New Jersey standards for declaring a mistrial without thereby barring retrial have been codified in *N.J.S.A.* 2C:1-9d, and then set out in full the relevant portions of the statute on which its decision is based. *Id.* at 11b - 12b. Next, the court below reiterated the two issues to be decided, again utilizing the verbatim language of the statute in stating these issues to be "whether retrial is nevertheless permitted either because defendant consented or

waived his right to object to the mistrial, or because the mistrial was 'required by sufficient legal reasons and a manifest or absolute or overriding necessity.'" *Id.* at 13b.

The opinion then disposed of the waiver or consent issue, citing once again to *N.J.S.A.* 2C:1-9d(1) in deciding that defendant had neither consented to nor waived his right to object to the mistrial. *Id.*

The last portion of the Appellate Division's opinion is devoted to an evaluation of the State's asserted justification for its mistrial motion and the determination that these reasons were neither legally sufficient nor manifestly necessary to require termination of the trial, as required by the New Jersey statute. *Id.* at 13b to 16b.

It is thus apparent from the "four corners of the opinion" that New Jersey Appellate Division's decision to bar the retrial of Respondent is grounded upon "bona fide, separate, adequate and independent" New Jersey statutory grounds, namely *N.J.S.A.* 2C:1-9. *Michigan v. Long*, 463 U.S. 1032, 1040, 1041 (1983). Consequently, any decision rendered by this Court contrary to the New Jersey court's would amount to nothing more than an advisory opinion, since the same judgment would be rendered by the New Jersey court even after this Court articulated its view of how federal double jeopardy principles might apply to this case. *See Herb v. Pitcairn*, 324 U.S. 117, 125, 126 (1945). By virtue of the limitations this Court has imposed on its own jurisdiction,

then, the State's Petition for a Writ of Certiorari must be denied.

In its Petition, the State constantly stresses that the court below ignored federal decisions such as *Arizona v. Washington*, 434 U.S. 497 (1978), *Gori v. United States*, 367 U.S. 364 (1961), and *United States v. Dinitz*, 424 U.S. 600 (1976), in reaching its conclusion that the retrial of defendant is barred. *See Pet. Brief* at pp. 6, 7, 19, 21, 28. The State is correct in this conclusion; nowhere in the opinion below are these cases mentioned. What the State utterly fails to appreciate, however, is that all these federal decisions were ignored for the simple reason that the case was being decided under the controlling state statute, *N.J.S.A.* 2C:1-9, and not under federal constitutional principles. Indeed, the absence of citation by the court below to any controlling federal cases makes it clear that the Appellate Division's decision is not premised primarily on federal law, and the state court did not feel "compelled by what it understood to be federal constitutional considerations "in construing its statute as it did. *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 568 (1977). *See Michigan v. Long*, *supra* at 1040-41.

For these reasons, then, this Court lacks the jurisdiction to hear and decide this case, and must therefore deny the State's Petition for a Writ of Certiorari.

II. EVEN WHEN JUDGED BY FEDERAL DOUBLE JEOPARDY PRINCIPLES, THE DECISION BELOW DOES NOT CONFLICT WITH THOSE PRINCIPLES OR WITH ANY DECISIONS OF THIS COURT OR THE COURTS OF APPEALS.

While it is the position of Respondent, as more fully set forth in Point I above, that the decision of the court below barring the retrial of Respondent was based upon the New Jersey court's interpretation and application of its state statutory standards, even if the facts of this case are judged by federal double jeopardy principles, the decision in no way conflicts with these principles or with extant decisions of this Court or the courts of appeal applying these principles. Consequently, there is no reason for this Court to exercise its discretion in favor of the Petition filed by the State of New Jersey.

The primary thrust of the State's Petition is that the decision below conflicts with the decisions of this Court in *Arizona v. Washington*, 434 U.S. 497 (1978), *Gori v. United States*, 367 U.S. 734 (1961), and *United States v. Dinitz*, 424 U.S. 600 (1975), and with the courts of appeals decisions in *United States v. Pridgeon*, 462 F.2d 1094 (5th Cir. 1972), and *United States v. Sedgwick*, 345 A.2d 465 (D.C. App. 1975), cert. den. 425 U.S. 966 (1976). Analyses of these cases demonstrates, however, that they are clearly distinguishable from the case at hand and, in most instances, also lend support to the decision of the court below.

In *Arizona v. Washington*, *supra*, this Court determined that the Double Jeopardy Clause did not bar retrial of the defendant where the prosecution's motion for a mistrial was necessitated by defense counsel's presentation of "improper and highly prejudicial evidence before the jury" in his opening statement. 434 U.S. at 515. In so ruling, however, the Court made it clear that the prosecution must shoulder the "heavy" burden of demonstrating a "high degree" of necessity for the mistrial before the bar of double jeopardy would be relaxed. *Id*. at 506. And retrial was held never to be permissible where the "prosecutor requests a mistrial in order to buttress weakness in his evidence." *Id*. at 507.

The factual circumstances giving rise to the State's motion for a mistrial in the case at hand are a far cry from the situation in *Arizona v. Washington*. Here, there was absolutely nothing improper or prejudicial in defense counsel's opening remarks to the jury, which merely made reference to the fact that there had been a prior juvenile court proceeding without going into any of the details of that hearing. Indeed, the trial court held that there was "not...any misconduct by the defense.... absolutely not." *Pet. App. C* at 8c. Furthermore, as the court below aptly pointed out, "the jury inevitably would learn of [the prior proceeding] in the course of the trial", and the State itself fully intended to present the jury with the in-court identification made during that proceeding. *Pet. App. B* at 15b, 8b - 9b.

It is also obvious, as the court below found, that the prosecutor's motion for a mistrial was motivated by the desire "to buttress weakness in his evidence", *Arizona v. Washington*, *supra* at 507, after his case had "turned sour" by the adverse evidential ruling. *Pet. App. B* at 16b. Instead of accepting the trial court's offer of a stay to allow an immediate appeal of the evidential ruling, the prosecutor elected to terminate the trial, thereby depriving defendant of his right "to conclude his confrontation with society through the verdict of a tribunal he might believe to be favorably disposed to his fate." *United States v. Jorn*, 400 U.S. 470, 486 (1971).

Under these circumstances, it is apparent that the State has failed to shoulder the "heavy" burden of demonstrating a "high degree" of necessity for its mistrial motion, and consequently there is no reason whatsoever to relax the bar of double jeopardy. *Arizona v. Washington, supra* at 506.

Petitioner's reliance on *United States v. Dinitz*, *supra*, is totally misplaced. There it was the defendant who sought and was granted a mistrial after his lead counsel had been expelled from the trial because of repeated misconduct. In ruling that the Double Jeopardy Clause did not bar retrial, this Court emphasized that where a defendant requests a mistrial, "different considerations obtain", and defendant's motion will be deemed a waiver of the double jeopardy protection unless it can be shown that the mistrial application was provoked by bad faith conduct on the part of the judge or prosecutor. 424 U.S. at 607, 611.

Here, in contrast to the situation in *Dinitz*, it was the State which moved for a mistrial and, consequently, the waiver rationale of *Dinitz* is totally inapplicable to the instant matter. *See United States v. Jorn*, supra at 485; *Oregon v. Kennedy*, 456 U.S. 667, 673-74 (1982).

Petitioner's reliance on *Gori v. United States*, supra, is likewise misplaced. In *Gori* it was held that the Double Jeopardy Clause did not bar retrial because the trial court's sua sponte mistrial order was the "product of the trial judge's extreme solicitude--an over-eager solicitude, it may be--in favor of the accused." 367 U.S. at 367. In the instant matter the mistrial was neither sought nor granted to protect defendant's right to a fair trial, but rather to allow the State to start anew after the adverse evidential ruling. *Gori* makes it clear that the declaration of a mistrial which affords the prosecution a more favorable opportunity to convict will bar retrial of the defendant. *Id.* at 369.

The factual circumstances in *United States v. Pidgeon*, supra, make it clearly distinguishable from the case at bar. In *Pidgeon* the court declared a mistrial when it was discovered that a juror had engaged in a conversation with a defense witness during the morning recess and with defendant's wife and daughter-in-law during the lunch break. The Fifth Circuit held that the Double Jeopardy Clause would not bar retrial in these circumstances because "it was the indiscretions of defendant's

witnesses and relatives which prompted the mistrial." 462 F.2d at 1096. (emphasis the Court's)

As the trial court below clearly found, in this case there was absolutely no misconduct, indiscretions or other action on the part of the defense which necessitated the State's mistrial motion. *See Pet. App. C* at 8c. Indeed, the trial court initially ruled outside the presence of the jury that defendant could inform the jury that the State's principle witness had been found incompetent. As the New Jersey Appellate Division noted in its opinion, the trial judge "could not simultaneously have believed that the [evidence] ruling was correct and that there was a 'manifest necessity' to grant a mistrial because the ruling was wrong." *Pet. App. B* at 16b, fnt. 4.

In *United States v. Sedgwick*, *supra*, a sua sponte mistrial was declared after it was discovered, near the end of the government's case, that the prosecution had inadvertently neglected to provide defendant with a police report which identified an individual who had bragged of committing the assault with which defendant was charged. 345 A.2d at 467. Before declaring the mistrial, however, the trial court held two days of hearings into the circumstances of the report and its follow-up by the police, and then suggested a further continuance to allow the defense to follow-up on this lead through an out-of-court investigation. *Id*. at 472, 473. Defense counsel rejected this suggestion because of other trial commitments, *Id*. at 472,

and insisted on dismissal of the indictment under the doctrine of *Brady v. Maryland*, 373 U.S. 83 (1963). 345 A.2d at 468.

The *Sedgwick* court, in what it described as a "close question", *Id.* at 468, declined to bar the retrial of defendant because the decision to declare a mistrial was for the purpose of insuring that the defendant received a fair trial.

> Plainly, the trial court's decision to discharge the jury was not calculated to help the prosecution in any respect, but to provide the defendant with information which might have strengthened a potential defense of mistaken identity.
>
> 345 A.2d at 472.
> [footnote omitted.]

In so deciding, the court noted that even if a mistrial is not motivated by any desire to assist the prosecution, if it nonetheless has this impact, double jeopardy will bar a retrial. *Id.* at 472, fnt. 4, *citing United States v. Bristol*, 325 A.2d 183 (D.C. App. 1974).

The contrast between *Sedgwick* and the case at hand is apparent. Here, the mistrial was not declared for the purpose of protecting Respondent's right to a fair trial, but rather was sought by the prosecution because its case had "turned sour" by the adverse evidential ruling which seriously undermined the credibility of its key witness. And here it was the prosecution which was offered the opportunity of an immediate appeal to overturn this evidential ruling, but it unaccountably chose instead to press again for a mistrial.

In sum, all of the cases which Petitioner contends are in conflict with the decision below are either easily distinguishable from the case at hand and/or tend to support the Appellate Division's ruling. Consequently, there exists no basis whatsoever for this Court to exercise its discretion in favor of the Writ sought by Petitioner. See Rule 10 of the Rules of the Supreme Court of the United States.

Furthermore, even if this Court were to consider the merits of the State's argument, it is apparent that under federal double jeopardy standards the State has utterly failed to satisfy its "heavy" burden of demonstrating a "high degree" of necessity for seeking the mistrial. *Arizona v. Washington*, *supra* at 506. When the grounds for the State's motion are examined, it becomes clear, as the court below found, that these grounds were nothing more than a pretext for the State to start over after its case had "turned sour" by virtue of the adverse evidential ruling. *Pet. App. B* at 16b. As *Arizona v. Washington*, *supra* at 507, unequivocally declares, retrial of a defendant will never be permissible where the "prosecutor requests a mistrial in order to buttress weakness in his evidence."

The first ground for a mistrial argued by the State involved the trial court's statement during jury selection that the jury would "be satisfied as to the explanation of the [13 year] delay" in bringing the defendant to trial. As soon as this remark was made, it was brought to the attention of the trial court, which then immediately cured it by explaining to the jury that neither

the State nor the defendant was required to justify the delay and the jury should not consider it. The trial court even questioned the jury to make sure it understood this and, being satisfied with the jury's response, then asked the prosecutor if the instruction "covers it". The prosecutor responded affirmatively, saying "Thank you, your Honor," and the issue was laid to rest.

The second ground on which the state premised its mistrial motion was even more innocuous than the first. In preliminary instructions to the jury before opening statements, the trial court reminded the jurors that they were the "judges of the facts" and urged them to pay strict attention to the testimony and evidence. In so doing, the court may have implied that it might not allow portions of the trial testimony to be read back to them during deliberations. The prosecutor did not object to this statement, but merely brought it to the trial court's attention. The trial judge assured the prosecutor that he would correct any mistaken impression he may have left with the jury when he gave his final charge. The prosecutor noted for the record his satisfaction with this procedure and sought no curative instruction.

For the State to contend that this event lends support to its mistrial motion is absolutely ludicrous, especially since the rereading of testimony during jury deliberation is always within the discretion of the trial court. Indeed, the State should have welcomed the trial court's remarks to the jury, since they

emphasized the jury's need to pay close attention to all testimony and evidence throughout the trial.

The third ground cited by the State as a basis for its mistrial motion was defense counsel's passing remark to the jury in his opening that there had been a prior juvenile hearing in the matter 13 years before, during which the State's key witness, Samuel Wilson, had testified. Nothing more about the nature of this hearing or the witness' testimony was said, and this was the very last statement which defense counsel made to the jury before the trial was aborted by the State.

As the court below aptly pointed out, this passing reference to the prior hearing and the fact that the State's witness had testified there in no way prejudiced the State, because it was inevitable during the course of the trial that the full particulars of Samuel Wilson's "contradictory and nonsensical testimony" at this hearing was going to come out. *Pet. App. B* at 15b. In fact, the State acknowledged at sidebar that it fully intended to introduce into evidence the identification Samuel had made during this hearing. *Id.* at 8b - 9b. Since defense counsel's remarks regarding the prior hearing were fully in keeping with the purpose of an opening statement--to preview the evidence to be introduced at trial--defense counsel's reference to the fact of a prior hearing created no grounds whatsoever, let alone a high degree of necessity, for the State to seek a mistrial.

The fourth ground which the State asserts as support for its mistrial motion was the evidential ruling allowing the prior determination of Samuel's competency as a witness to be presented to the jury. This ruling, however, in no way affected the jury's impartiality or ability to fairly judge the case because it occurred at a sidebar conference and the information regarding Samuel's competency never reached the ears of the jurors. Thus, as the court below pointedly noted, "the jurors could not have formed 'preconceived ideas or notions' from the fourth event because it occurred outside their presence." *Id.* at 13b.

Furthermore, when the prosecutor took sharp exception to this evidential ruling, the trial court informed the prosecutor that it would grant a stay of the trial to allow an immediate appeal of the ruling. The trial court even went so far as to suspend defense counsel's opening and grant a recess so the prosecutor could consider his next move. Despite this accommodation, the State chose not to appeal but instead to seek the extraordinary remedy of a mistrial. Since there was absolutely no need for the State to resort to this inappropriate remedy, it is apparent, as the court below found, that "the State wanted to start over because its case had 'turned sour' or, for some undisclosed inexcusable reason it was not able to proceed." *Id.* at 16b.

In sum, there was absolutely nothing prejudicial occurring in the presence of the jury which created the "high degree" of necessity required for the State to demand a mistrial. *Arizona*

v. Washington, *supra* at 506. The events of which the State complains were simply everyday occurrences in the trial courts of this country. The minor misstatement by the trial court regarding the reasons for delay was immediately corrected to the prosecutor's satisfaction. The only event which could have in any way prejudiced the State was the adverse evidential ruling, but the jury was not privy to this and thus it had no effect on their ability to fairly decide the case. However, the adverse evidential ruling is extremely significant because it was the event which immediately triggered the State's mistrial motion. Clearly this ruling constituted a set-back to State's case, and it was because of this that the State sought to abort the trial. But as *Arizona v. Washington*, *supra* at 507, and *Gori*, *supra* at 369, teach, when the declaration of a mistrial is used to afford the prosecution a more favorable opportunity to convict or to buttress weakness in its evidence, Fifth Amendment double jeopardy principles will always bar a retrial.

In its Petition the State also contends that Respondent waived his right to object to the termination of the trial by not again arguing in opposition to the State's renewal of its mistrial motion after the recess. This argument misses the mark for three reasons.

First and foremost, the ruling of the court below that Respondent had neither consented to nor waived objection to the mistrial is clearly based solely upon its interpretation and application of *N.J.S.A.* 2C:1-9d(1), since that is the only

authority cited by the court in making this determination. *See Pet. App. B* at 2b, 13b. Its decision is, therefore, a matter of state law and beyond the jurisdiction of this Court to decide. *See* Point I *supra*.

Secondly, counsel for Respondent had already evidenced his opposition to the State's first mistrial motion made prior to the recess, and that motion had been summarily denied by the trial court. The court below therefore properly found that there was "nothing in the record to suggest that Respondent's attorney had withdrawn his opposition to the mistrial. His waiver of the opportunity to express his opposition again certainly was not a waiver of the opposition he had previously expressed." *Pet. App. B* at 13b.

Finally, after the court had indicated it was inclined to grant the State's motion, but before the jury was called in and discharged, defense counsel brought to the State's and the trial court's attention the fact that the mistrial might effectively bar the retrial of Respondent. Despite this, the State did not seek to withdraw its motion, but instead again argued in support of it, and the trial court affirmed its mistrial ruling.

Under these circumstances, it is obvious that Respondent neither consented to nor waived his right to object to the termination of the trial, as required by the controlling statute, *N.J.S.A.* 2C:1-9d(1).

The remainder of the State's Petition is spent either arguing that the incompetency ruling was inadmissible or

contending that the interests of justice demand that Respondent be retried.

Little need be said with regard to the evidence ruling for two reasons. First, since the incompetency finding was never entered into evidence or heard by the jury, its admissibility or inadmissibility is academic and unrelated to the issues for which the State seeks the Writ. Secondly, the propriety of the trial court's ruling on the admission of this evidence is a state law issue not subject to review by this Court. *See Pet. App. B* at 15b, fnt. 3 and Point I *supra*.

With respect to Petitioner's "interests of justice" argument, this is nothing more than pure rhetoric. The New Jersey Legislature has enacted statutory standards which govern the circumstances under which its trial courts may properly terminate a criminal trial without barring the retrial of the defendant. *See N.J.S.A.* 2C:1-9. The unanimous panel of the New Jersey Appellate Division has determined that those standards were not met in this case. The New Jersey Supreme Court has found no basis to even consider this determination, let alone overturn it. *See N.J. Court Rule* 2:12-4. Thus, the three principal lawmakers in New Jersey, its Legislature, its Appellate Division, and its Supreme Court, have all determined that the interests of justice and due process of law bar the retrial of the Respondent.

Contrary to the State's assertion, the decision of the court below is not based on a technicality or a situation where form

has been placed over substance. Rather, the decision below is firmly grounded on a proper and just interpretation and application of statutory standards which have been in place in New Jersey for 12 years, and which govern all criminal trials in New Jersey, be they petty larceny or murder prosecutions. There is absolutely nothing in the statutory history of this legislation or, indeed, in the Fifth Amendment to the United States Constitution, which creates a special exception for homicide cases, as the State proposes.

What the State fails to either acknowledge or confront is the fact that it voluntarily elected to terminate the trial for improper and insufficient reasons after the jury had been sworn. The State was in no way forced or compelled to do so by any circumstances beyond its control. By opting for a mistrial instead of accepting the trial court's offer of a stay pending appeal, the State forfeited its right to try Respondent again. No amount of rhetoric or hyperbole can change this fact, and it is the State, and not Respondent or "the system", must bear the consequences.

CONCLUSION

For the reasons expressed above, it is respectfully submitted that this case presents no federal issue whatsoever, let alone an important constitutional issue regarding the application of the Double Jeopardy Clause. Furthermore, even under federal double jeopardy principles, there was no necessity at all, let alone the "high degree" of necessity required by *Arizona v. Washington*, for the State to seek a mistrial. The State's mistrial motion was sought in order to afford it a more favorable opportunity to convict after its case had suffered a serious set back by the adverse evidential ruling. The Double Jeopardy Clause will always bar retrial in these circumstances, as this Court has often held. Since there is no need for additional precedent on this point, the Petition of the State of New Jersey for a Writ of Certiorari should be denied.

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Dated: January 19, 1990

89-1113

Supreme Court, U.S.
FILED
FEB 9 1990
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

STATE OF NEW JERSEY

v.

LEROY HOWARD

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

No. 89-1113

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STATE OF NEW JERSEY
vs.
LEROY HOWARD

} REPLY BRIEF

LEGAL ARGUMENT

POINT I THE UNITED STATES SUPREME COURT HAS JURISDICTION IN THIS MATTER.

This Court has jurisdiction in this matter because the New Jersey Appellate Division did not decide this matter on the basis of an adequate and independent state ground. The Appellate Division cited federal constitutional law, as well as New Jersey cases based on federal law. Moreover, given the narrow scope of the double jeopardy clause of the New Jersey Constitution, it is clear that the decision in this matter was based on federal law.

The State is appealing from the denial of its petition for certification by the New Jersey Supreme Court, which denied the petition without an opinion. Under these circumstances, it cannot be assumed that the New Jersey Supreme Court relied on non-federal grounds not specified in the Appellate Division opinion. *Cicenia* v. *Lagay*, 357 *U.S.* 504, 507, n.02, (1958).

At the trial level arguments (App. C-6 to 9; App. D-1 to 8), there was specific reference to federal constitutional law both by the court (App. D-1) and by the defendant (App. D-7 to 8). Moreover, the defendant's trial court brief relied on the

United States Constitution and numerous federal cases (App. E), which the trial court acknowledged (App. D-1). Thus, the federal constitutional issue was set up and claimed at the trial level, and the trial court considered federal law in rendering its decision.

The appellate briefs of the defense and the State relied on federal constitutional law (App. F & G). Thus, issue was joined in the Appellate Division on federal grounds. Likewise, in the New Jersey Supreme Court both the State and the defense relied on federal constitutional law, and issue was joined in that forum on federal grounds (App. H, I, & J).

The defendant argues that the Appellate Division's decision does not involve the Fifth or Fourteenth Amendments of the United States Constitution, and only involves *N.J.S.A.* 2C:1-9. The defendant completely leaves out any mention of the New Jersey or federal cases cited by the Appellate Division, or the cited New Jersey or federal constitutional provisions. However, the Appellate Division specifically cited and relied on the Fifth and Fourteenth Amendments of the United States Constitution (App. B-11) and *United States* v. *Perez*, 22 *U.S.* 579 (1824) (App. B-15). Thus, the New Jersey Appellate Division clearly relied on federal grounds in deciding this matter.

Moreover, the New Jersey cases cited by the Appellate Division (App. K) all rely on the federal constitution and federal cases in deciding the double jeopardy issue. Under *Michigan* v. *Long*, 463 *U.S.* 1032, 1039 (1983), the United States Supreme Court has jurisdiction if the state court relied on a state case which rested on federal grounds. Thus, this Court would have jurisdiction under that case.

Likewise, under *Zacchini* v. *Scripps-Howard Broadcasting Co.*, 433 *U.S.* 562, 568, (1977), the United States Supreme Court has jurisdiction if the lower court opinion indicates that the state court felt compelled by federal constitutional considerations to apply state law as it did. In this case, it is clear that the Appellate Division did feel compelled by federal constitutional considerations to apply New Jersey law as it did, given its citations to and reliance on the Fifth and

Fourteenth Amendments of the United States Constitution and the case of *U.S.* v. *Perez*, *supra*, as well as reliance on New Jersey cases resting on federal grounds.

In *Turner* v. *Louisiana*, 379 *U.S.* 466, 470-471 (1964), this Court held that although the state supreme court's opinion was cast in terms of State law, that court's affirmance of the defendant's conviction necessarily rejected the defendant's federal Fourteenth Amendment claim. Likewise, in the instant case, the Appellate Division's decision necessarily adjudicated the defendant's federal constitutional rights.

Whether the case involves a federal question is itself a federal question. *Henry* v. *Mississippi*, 379 *U.S.* 443, 447, (1965). Likewise, in *Allied Stores, Inc.*, v. *Bowers*, 358 *U.S.* 522, 525 (1959), this Court held:

> It is settled that "[w]hether a pleading sets up a sufficient right of action or defense, grounded on the Constitution or a law of the United States, is necessarily a question of federal law; and where a case coming from a state court presents that question, this Court must determine for itself the sufficiency of the allegations displaying the right or defense, and it is not concluded by the view taken of them by the state court." *First National Bank* v. *Anderson*, 269 *U.S.* 341, 346, *Staub* v. *City of Baxley*, 355 *U.S.* 313, 318.

In deciding the waiver issue against the State, the Appellate Division specifically cited *N.J.S.A.* 2C:1-9d(1) (App. B-13). However, in setting up the discussion of that statutory provision, the Appellate Division cited the Fifth and Fourteenth Amendments of the United States Constitution, as well as the double jeopardy clause of the New Jersey Constitution and several New Jersey cases decided on the basis of federal grounds (App. B-11 to 12). Thus, the question of whether a federal right had been waived was considered by the Appellate Division.

The procedure for waiving a federal right is a federal question, according to *Parker* v. *Illinois*, 333 *U.S.* 571, 574 (1948), which held:

> When federal rights are involved, it is, of course, for this Court finally to determine whether the failure to follow the procedure designated by a State for their protection constitutes a waiver of them. *Davis* v. *O'Hara*, 266 *U.S.* 314; *Central Union Co.* v. *Edwardsville, supra* (269 *U.S.* 190 (1925)).

On this same point see also *Henry* v. *Mississippi*, 379 *U.S.* 443 (1965).

Moreover, the United States Supreme Court has the supreme power to determine the procedure whereby federal rights are protected. Thus, in *Colorado* v. *Connelley*, 479 *U.S.* 157, 167-169 (1986) and *Lego* v. *Twomey*, 404 *U.S.* 477, 488 (1972), this Court decided that the voluntariness of a confession must be proved by state prosecution authorities by a preponderance of the evidence, contrary to the holdings of state courts that it must be proved by clear and convincing evidence (*Connelley*) or beyond a reasonable doubt (*Lego*). Likewise, in *Crist* v. *Bretz*, 437 *U.S.* 28 (1978), this Court held that a Montana statute was unconstitutional because it provided that jeopardy attached in a jury trial when testimony was taken from the first witness rather than at the swearing of the jury, which is the federal rule.

Furthermore, the waiver issue was not dispositive. Having decided that issue, the Appellate Division then had to decide the issue of whether there was a manifest necessity to declare a mistrial. In considering this issue, the court cited and considered the case of *United States* v. *Perez, supra* (App. B-15). Also, in setting up the discussion with respect to the manifest necessity issue, the court cited the *United States Constitution*, Amendments V and XIV, and several New Jersey cases which were based upon federal constitutional law (App. B-11 to 12).

It should be further noted that the State of New Jersey in the year 1947 adopted a constitution which contained the following provision on the subject of double jeopardy: "No

person shall, after acquittal, be tried for the same offense." *New Jersey Constitution*, Article 1, § 11. This provision is much narrower than the federal provision, which provides, in pertinent part, "... nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb..." *United States Constitution*, Amendment V.

Accordingly, it is apparent that the Appellate Division's decision, since it does not deal with a case which has already resulted in acquittal, cannot be based directly on the New Jersey Constitution. Moreover, any reliance on *N.J.S.A.* 2C:1-9d is ultimately grounded on federal law. The Appellate Division in the instant case cited *State In The Interest of D.P.*, 232 *N.J. Super.* 8, 13-14, 56 *A.*2d 335 (App. Div. 1989), in which the Appellate Division stated that in adopting *N.J.S.A.* 2C:1-9, the New Jersey Criminal Code adopted the test set forth in *State* v. *Romeo*, 43 *N.J.* 188, 195-196, 203 *A.*2d 23 (1964), *cert.* den. 379 *U.S.* 970 (1965). In *State* v. *Romeo*, *supra*, at 195-197, the New Jersey Supreme Court relied on *State* v. *Locklear*, 16 *N.J.* 232, 108 *A.*2d 436 (1954), and went on to state, at 43 *N.J.* 196, as follows:

> Indeed the criteria just referred to as announced in *Locklear*, *supra* (16 *N.J.* 232), were expressly based upon the principles laid down by Mr. Justice Story in the leading case of *United States* v. *Perez*, 9 *Wheat.* 579, 580, 6 *L.Ed.* 165 (1824)...

Thus, it is apparent that any New Jersey court decision barring re-trial in a case which did not proceed to the point of acquittal must necessarily be based on the federal constitution and case law, whether directly or through the medium of New Jersey cases decided on the basis of federal cases and principles. Likewise, even a decision based on *N.J.S.A.* 2C:1-9d is in turn based on federal cases or on state cases which are based on federal principles. Therefore, this Court has jurisdiction under *Michigan* v. *Long*, *supra*, and *Zacchini* v. *Scripps-Howard Broadcasting Co.*, *supra*.

Likewise, when the non-federal ground is so interwoven with the federal ground that it is not an independent matter,

the jurisdiction of this Court is apparent. *Abie State Bank* v. *Bryan*, 282 *U.S.* 765, 773 (1931).

In response to the State's charges that the New Jersey courts deliberately ignored United States Supreme Court and Federal Circuit Court decisions which would have yielded a different result on the double jeopardy issue, the defendant has argued that the New Jersey Appellate Division did not mention the federal cases because it was deliberately deciding this matter solely on the basis of New Jersey law. However, this argument fails on two grounds.

To begin with, the Appellate Division not only ignored federal cases, but ignored the New Jersey case of *State* v. *Blanks*, 190 *N.J. Super.* 269, 463 *A.*2d 359 (App. Div. 1983), an opinion written by one of the members of the present panel. The *Blanks* case, which was based on federal and state law, should have controlled in this situation, but the State's citation of it was not even acknowledged by the Appellate Division, which did not discuss or distinguish *Blanks*.

Secondly, the Appellate Division did cite the *United States Constitution*, Amendments V and XIV, and *U.S.* v. *Perez*, *supra*, in reaching its decision. Thus, it does not make any sense to say that the Appellate Division deliberately ignored *Arizona* v. *Washington*, *Gori* v. *United States*, *United States* v. *Dinitz*, *United States* v. *Sedgwick*, and *United States* v. *Pridgeon*, (citations contained in Table of Authorities), in order to decide this matter solely on State grounds, when the Appellate Division clearly referred to other federal Constitutional sources.

Rather than intentionally omitting citations to federal cases in an effort to decide this matter solely on state grounds, the Appellate Division intentionally omitted citations to federal or state cases on point, in order to decide this matter in a way which suited their particular purpose in this case, which was inconsistent with the applicable state and federal law. The Appellate Division's action is especially significant in light of the United States Supreme Court decisions holding that a state ground may be considered inadequate if it is inconsistent with the earlier decisions of the state court.

Barr v. *City of Columbia*, 378 *U.S.* 146 (1964); *Indiana ex rel. Anderson* v. *Brand*, 303 *U.S.* 95 (1938); *Fox River Paper Co.* v. *Railroad Comm'n.*, 274 *U.S.* 651 (1927).

Finally, it is difficult to see how a state court can decide an issue of double jeopardy without taking into account the federal law on the subject. If the state court had decided, using no federal citations at all, that the defendant's double jeopardy rights would not be violated by a re-trial, the defendant would not be precluded from petitioning this Court for certiorari on the basis of federal rights, or precluded from filing a federal habeas corpus petition. Likewise, if the State seeks certiorari regarding the same decision, federal rights and law are just as involved as if the defendant had sought review. The State is just as entitled to have this Court determine whether federal rights were adjudicated properly as the defendant would be. *Benton* v. *Maryland*, *395 U.S.* 784 (1969).

POINT II THE DEFENDANT'S ARGUMENT FAILS ON SUBSTANTIVE GROUNDS.

The second point in the defendant's brief deals with the substantive arguments. The defendant upholds his introduction of improper comment in the opening statement by arguing that the State had expressed an intention to introduce the in-court identification made by Samuel Wilson in 1976. During pre-trial preparation, the State informed the defendant that it intended to introduce evidence of the in-court identification, as well as the on-scene identification. However, the State did not mention in-court identification during its opening statement. A subsequent review of New Jersey *Evidence Rule* 63(1)(c) indicated that the in-court identification would not be admissible at trial, since the court's incompetency ruling at that time would have made the statement inadmissible if made by Samuel Wilson in an attempt to testify in court at that time (1976). Nevertheless, the on-scene identification would be admissible under New Jersey *Evidence Rule* 63(4) as a spontaneous and contemporaneous statement, even though the witness was incompetent at the time it was made. *State In The Interest of C.A., a Juvenile*, 201 *N.J. Super.* 28, at 31-32 (App. Div. 1985).

In any event, whether the court had properly excluded the prior in-court identification or improperly admitted it, the prior incompetency ruling would have been irrelevant and inadmissible either for the purpose of attacking the prior in-court identification or attacking Samuel's credibility in general. Under New Jersey *Evidence Rule* 17(b), the incompetency ruling constitutes the inadmissible hearsay opinion of the judge that Samuel could not testify because his age made him incapable of understanding the duty of a witness to tell the truth. As a means of attack on present-day testimony, that opinion is irrelevant, because the limitations based on age no longer apply to an 18 year old. As a means of attacking the prior out-of-court identification, which would be admitted under New Jersey *Evidence Rule* 63(4) a prior incompetency determination would be irrelevant, because the testimony of witnesses to the identification would be admissible even if the identifying witness had been incompetent. *State In The Interest of C.A., a Juvenile, supra*, at 31-32. Finally, the incompetency ruling would not be admissible as a means of attacking even an erroneously admitted prior in-court identification, since prior findings of fact or rulings of law based on such findings of fact cannot be permitted to influence a jury's factual determination. *State* v. *Zamorsky*, 159 *N.J. Super.* 273, 387 *A.*2d 1227 (App. Div. 1978); *State* v. *Zamorsky*, 170 *N.J. Super.* 198, 200, 406 *A.*2d 192 (App. Div. 1979); *State* v. *Tirone*, 64 N.J. 222, 228, 314 *A.*2d 601 (1974); New Jersey *Evidence Rule* 8(3); *State* v. *Hampton*, 61 *N.J.* 250, 294 *A.*2d 23 (1972); *State* v. *Bowman*, 165 *N.J. Super.* 531, 398 *A.*2d 908 (App. Div. 1979); *State* v. *Humphrey*, 183 *N.J. Super.* 580, 444 *A.*2d 1135 (Law Div. 1982); *Arizona* v. *Washington*, 43 *U.S.* 497, 510-511 (1978).

It is improper to refer a trial jury to prior factual determination according to *State* v. *Blanks*, 190 *N.J. Super.* 269 (App. Div. 1983), where the court observed:

> The State and defendant equally have an interest in exclusion of improper evidence. Here we have a witness who with deliberation was seeking the opportunity to intrude the determination of another jury into this case. (190 *N.J. Super.* at 278.)

Thus, the defendant defends his attempt to introduce irrelevant evidence regarding the incompetency ruling by assuming that the State would attempt to and would secure an incorrect ruling admitting inadmissible evidence regarding the in-court identification. This is no justification for attempting to introduce irrelevant evidence regarding the incompetency ruling and prior proceedings, especially since the State had not mentioned the in-court identification in its opening statement, had not attempted to introduce it in any way, had not sought or received any pre-trial ruling admitting it, and would have been foreclosed from introducing it by New Jersey *Evidence Rule* 63(1)(c).

The defendant also argues that the propriety of an evidence ruling is a state law matter, and should not be reviewed by this Court. However, this is a state law matter which is critical to the determination of whether or not the defendant's federal rights would be violated by a re-trial. When a mistrial was granted because the defense referred to evidence inadmissible under state law, a re-trial would not violate the defendant's double jeopardy rights. The admissibility under state law of evidence which the defense attempted to introduce was considered by this Court in *Arizona* v. *Washington*, 434 *U.S.* 497, 499-500, fn.3, 510-511, 521 (1978). The inadmissibility of the evidence under Arizona law was the primary reason that this Court ruled that a re-trial would not be barred in that case.

The defendant also argues that under *U.S.* v. *Sedgwick*, 345 *A.*2d 465 (D.C. App. 1975), if a mistrial even happens to have the effect of helping the prosecution, re-trial is barred. This is clearly not the holding of that case. The court merely noted that the trial court had tried to aid the defense rather than the prosecution.

In the defendant's Statement of Facts, he mentions that he passed an unstipulated polygraph examination in 1976. Under New Jersey law, the results of an unstipulated polygraph test are not admissible into evidence. *State* v. *McDavitt*, 62 *N.J.* 36, *A.*2d (1972). The State vehemently objects to having the defendant introduce the issue of the polygraph test before this Court, since it is inadmissible and

irrelevant in any stage of a New Jersey proceeding. The defendant has repeatedly attempted to introduce this, at oral argument before the New Jersey Appellate Division on a prior appeal, and in his Appellate Division and New Jersey Supreme Court briefs on the present appeal. Hence we have, right in the context of the defendant's brief, an indication of his attitude and behavior with respect to the introduction of improper evidence. As if more proof were needed besides the record in the trial court, the defendant has incorporated into his brief before this Court an attempt to introduce evidence inadmissible at trial under New Jersey law. It is no more proper for defendant to do this than it would be for the State to introduce in its case in chief the fact that the defendant was convicted in 1989 of aggravated assault charges as a result of his having stabbed his current girlfriend. Both matters would be irrelevant.

CONCLUSION

On the basis of the foregoing arguments, it is respectfully submitted that the United States Supreme Court has jurisdiction to consider this matter. It is further respectfully submitted that a Writ of Certiorari should issue to review the decisions of the New Jersey Supreme Court and the Appellate Division of the New Jersey Superior Court.

Respectfully submitted,

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PROSECUTOR

BY: /s/ JOHN A. MENNITE
JOHN A. MENNITE
ASSISTANT PROSECUTOR

DATED: FEBRUARY 8, 1990

APPENDIX E

AUTHORITIES CITED IN DEFENDANT'S TRIAL COURT BRIEF

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Wade v. *Hunter*, 336 *U.S.* 684 (1949)

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United States v. *Perez*, 22 *U.S.* 579 (1824)

United States v. *Coolidge*, 25 *Fed. Cas.* 622

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